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Municipal Hospital Closings Under Title VI: A Requirement of Reasonable Justifications

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THE HANDICAPPED AND MASS TRANSPORTATION: THE EFFECTIVENESS OF SECTION 504 IN IMPLEMENTING EQUAL ACCESS

I. Introduction

On September 19, 1980, the board of directors of the Metropolitan Transportation Authority of the City of New York ("MTA"), in an unprecedented move, voted not to comply with federal regulations requiring mass transit systems to be made accessible to the handicapped.¹ After conducting a cost-benefit analysis, MTA concluded that compliance would be too expensive — \$1.5 billion initially — while annual federal subsidies potentially to be forfeited were only one-third this sum, approximately \$435 million.² The MTA subsequently reversed its position and applied to the Department of Transportation ("DOT") for a six-month extension period to submit a plan of compliance.³

The regulations involved⁴ were promulgated by DOT under the authority of three statutes: section 16(a) of the Urban Mass Transportation Act of 1964,⁵ section 165(b) of the Federal-Aid Highway Act of 1973,⁶ and section 504 of the Rehabilitation Act of 1973.⁷ In 1970, the first of these statutes to advance the rights of the handicapped to use mass transportation, the Urban Mass Transportation ("UMT") Act, declared it to be the "national policy that elderly and handicapped persons have the same right as other persons" to use mass transportation facilities and services and re-

1. N.Y. Times, Sept. 20, 1980, at A1, col. 4. The regulations were issued by the Department of Transportation ("DOT") requiring recipients of federal funds to submit a plan to make mass transportation accessible to the handicapped. 49 C.F.R. § 27.103 (1980).

2. N.Y. Times, Sept. 20, 1980, at A1, col. 4.

3. N.Y. Times, Oct. 19, 1980, at A33, col. 1. In fact, MTA had already drafted a plan of compliance which it subsequently submitted to the DOT on December 31, 1980. New York Metropolitan Transportation Authority, *Draft Section 504 Transition Plan for Handicapped Accessibility* (Sept. 1980) [hereinafter cited as *Transition Plan*]. See also Letter from Richard Ravitch, Chairman of MTA, to Neil Goldschmidt, Secretary of Transportation (Dec. 31, 1980), reprinted in *Transition Plan*, *supra*.

4. 49 C.F.R. §§ 27.81-.107 (1980).

5. 49 U.S.C. § 1612(a) (1976).

6. 23 U.S.C. § 142 note (1976).

7. 29 U.S.C. § 794 (1976).

quired "special efforts" in the planning and design of accessible facilities.⁸ Three years later, Congress passed the Federal-Aid Highway Act of 1973 which required mass transportation funded by the federal government to be designed to be effectively utilized by the elderly or handicapped who would be unable to use such services unless special facilities were designed.⁹ The act was later amended to make the rights of the handicapped to accessible mass transportation even more explicit: projects must not only be planned and designed for effective use, but also constructed and operated to allow for effective use by the handicapped, including the non-ambulatory wheelchair bound.¹⁰ The last in this series of protective statutes, section 504 of the Rehabilitation Act ("section 504"), contained a general clause prohibiting discrimination against the handicapped by recipients of federal funds.¹¹

Section 504 has had a dramatic, if short, history and has provided the foundation for a number of suits by the handicapped seeking enforcement of their civil rights.¹² Section II of this Comment discusses the legislative history of section 504, while Section III describes the enforcement problems courts and administrative agencies have encountered. Section IV summarizes the agency rules implementing the statute. Section V of this Comment then examines the MTA's study which led to its initial refusal to comply with federal rules and compares the transit authority's findings with a study conducted by a coalition of handicapped groups. Finally, section VI briefly discusses alternative avenues under New York state law through which the handicapped can assert their right to equal access to mass transportation for the handicapped¹³ in view of the increasing reluctance of the judiciary and legislature

8. 49 U.S.C. § 1612(a) (1976).

9. Federal-Aid Highway Act of 1973, Pub. L. No. 93-87, § 165(b), 87 Stat. 282 (1973) (codified at 23 U.S.C. § 142 note (1976)).

10. Federal-Aid Highway Act Amendment of 1974, Pub. L. No. 93-643, § 105(b), 88 Stat. 2283 (codified at 23 U.S.C. § 142 note (1976)).

11. 29 U.S.C. § 794 (1976).

12. See, e.g., *Southeastern Community College v. Davis*, 442 U.S. 397 (1979) (deaf student sought admission to nursing school); *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277 (7th Cir. 1977) (handicapped group sought access to mass transportation); *Drennon v. Philadelphia Gen. Hosp.*, 428 F. Supp. 809 (E.D. Pa. 1977) (epileptic denied employment as hospital technician).

13. Constitutional arguments of equal protection for the handicapped are beyond the scope of this Comment. See note 265 *infra* and accompanying text.

in enforcing section 504.

II. Legislative History

Section 504 provides: "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."¹⁴ The plain language of the statute indicates Congress' desire to ensure that federally assisted programs not discriminate solely on the basis of a handicap. Despite the seeming simplicity of this provision, however, it has proven difficult for courts and administrative agencies to ascertain the scope of statutory protection and to provide enforcement.¹⁵ As a result, many of the handicapped fear that section 504 may become, in the words of one commentator, a "symbolic law" — a law without sufficient enforcement power.¹⁶ A consideration of the legislative history of section 504 requires two lines of inquiry: first, the background of the Rehabilitation Act as a whole and, second, the drafting of the specific section's language. While these queries are distinct, together they suggest the scope of the section's protection.

Clearly, the historical emphasis of the Rehabilitation Act has been on *vocational* rehabilitation. Its genesis was the 1920 Smith-Fess Act¹⁷ which provided the disabled with job training, counseling, and placement.¹⁸ Major amendments to this act were passed between 1943 and 1968 which enlarged the act's scope and effectiveness by: 1) providing for medical services; 2) expanding the class of beneficiaries to include the mentally ill and mentally retarded; 3) establishing research and rehabilitation programs; and 4) increasing federal financial support.¹⁹ In 1972 Congress again

14. 29 U.S.C. § 794 (1976).

15. See 41 Fed. Reg. 20296 (1976).

16. Achtenberg, "*Crips*" Unite to Enforce Symbolic Laws: Legal Aid for the Disabled: An Overview, 4 U. SAN FERN. V. L. REV. 161 (1975) [hereinafter cited as "*Crips*" Unite].

17. Smith-Fess Act, Pub. L. No. 66-236, 41 Stat. 755 (1920). See S. REP. NO. 318, 93d Cong., 1st Sess. 9, reprinted in [1973] U.S. CODE CONG. & AD. NEWS 2076, 2082 [hereinafter cited as S. REP. NO. 318].

18. S. REP. NO. 318, *supra* note 17, at 9, [1973] U.S. CODE CONG. & AD. NEWS at 2082.

19. S. REP. NO. 318, *supra* note 17, at 9-11, [1973] U.S. CODE CONG. & AD. NEWS at 2082-84.

sought to extend this program, then called the Vocational Rehabilitation Act, by unanimously passing a far-reaching amendment which contained a provision, later known as "section 504," barring discrimination against "otherwise qualified" handicapped individuals in programs receiving federal financial assistance.²⁰ Despite overwhelming bipartisan Congressional approval of the statute, President Nixon twice vetoed the legislation as "fiscally irresponsible," though neither veto message criticized the anti-discrimination measure in particular.²¹ With further budget cuts mandated by the President, the Rehabilitation Act was finally enacted on September 26, 1973.²² Two factors in the legislative history of the Rehabilitation Act indicate Congress' intent to confer broad rights on the handicapped. First, the title of the legislation was changed to exclude the adjective "vocational."²³ Second, Congress' desire to expand the scope of the act's protection led to a 1974 amendment which redefined "handicapped" to eliminate reference to vocational goals.²⁴

20. See S. REP. No. 1297, 93d Cong., 2d Sess. 39, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6373, 6390 [hereinafter cited as S. REP. No. 1297].

The Senate version contained this anti-discrimination language, but the House version had no comparable provision. The measure was, however, adopted by the Conference Committee. Joint Explanatory Statement of the Committee of Conferees, *Hearings on S.7. Before the Subcommittee on the Handicapped of the Committee on Labor and Public Welfare*, 93d Cong., 1st Sess., 196 (1973) [hereinafter cited as *Hearings on S.7*].

21. See Memo of Veto to H.R. 8395, October 27, 1972, reprinted in *Hearings on S.7*, *supra* note 20, at 198. See also Memo of Veto to S.7, March 27, 1973, reprinted in [1973] U.S. CODE CONG. & AD. NEWS at 2088-90.

22. S. REP. No. 1297, *supra* note 20, at 25, [1974] U.S. CODE CONG. & AD. NEWS at 6376.

23. As an accompanying Senate report explained, this modification expressed the "new thrust of the bill. . . . While the Committee expects and mandates . . . that the program will remain vocationally oriented, it does believe that . . . [severely] handicapped individuals . . . [who] may never achieve employment . . . should not be denied services." S. REP. No. 318, *supra* note 17, at 19, [1973] U.S. CODE CONG. & AD. NEWS at 2092. Nevertheless, even the most recent complaints under the Rehabilitation Act stress loss of potential employment in the pleadings. See, e.g., *Dopico v. Goldschmidt*, No. 80-4562, 13-14 (S.D.N.Y. filed Aug. 7, 1980); *Disabled in Action v. Goldschmidt*, No. 80-1862, 13-16 (S.D.N.Y. filed Aug. 21, 1980).

24. "Handicapped individual," as originally defined, included

any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to . . . this chapter.

Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 361 (1973). The 1974 definition included the 1973 language and added the following:

The second aspect of the history of section 504 concerns the origins of its specific language. Explicitly patterned after the anti-discrimination language of section 601 of the Civil Rights Act of 1964, the wording of section 504 demonstrates Congress' intent to similarly prohibit discrimination against the handicapped.²⁵ In fact, section 504 was the final result of earlier attempts to amend Title VI of the Civil Rights Act itself to include such a provision to protect the handicapped.²⁶ Despite section 504's close relationship with the Civil Rights Act, courts have been reluctant to afford as extensive protection to the handicapped suing under the Rehabilitation Act, especially to those desiring equal access to mass transportation, as they have given to those seeking protection under the Civil Rights Act.²⁷ Rather, questions have been raised which center upon the methods — indeed, the propriety — of enforcing the pro-

any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, of (C) is regarded as having such an impairment.

Rehabilitation Act of 1974, Pub. L. No. 93-516. 88 Stat. 1619 (codified at 29 U.S.C. § 706(6) (1976)). In the words of a Senate report: "Section 504 was enacted to prevent discrimination against all handicapped individuals, regardless of their need for, or ability to benefit from, vocational rehabilitation services, in relation to Federal assistance in employment, housing, transportation, education, health services, or any other Federally-aided programs." S. REP. NO. 1297, *supra* note 20, at 38, [1974] U.S. CODE CONG. & AD. NEWS at 6388.

25. S. REP. NO. 1297, *supra* note 20, at 39, [1974] U.S. CODE CONG. & AD. NEWS at 6390. The Civil Rights Act provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving any Federal financial assistance." 42 U.S.C. § 2000d (1976).

26. During the 92d Congress, Representative Charles Vanik introduced H.R. 12154. 117 CONG. REC. 45974-75 (1971). An identical bill was introduced in the Senate by Senators Hubert Humphrey and Charles Percy. 118 CONG. REC. 525-26 (1972). The bills prohibited discrimination "unless lack of such physical or mental handicap is a bona fide qualification reasonably necessary to the normal operation of such program or activity." In these bills, a handicap was not defined in reference to vocation. *Id.* at 526. As Congressman Vanik noted in the floor debates on the Rehabilitation Act of 1973:

In December of 1971 I introduced a bill that incorporated the handicapped into the Civil Rights Act of 1964. Regardless of the fact that 60 Members of the House and 20 Members of the Senate cosponsored the civil rights bill, it was not reported to the floor by either Judiciary Committee.

Senator Humphrey who introduced my bill in the Senate, incorporated the language and intent of my bill into the Vocational Rehabilitation Act last year in the Senate.

I am happy to say that my language remains in . . . today's bill.

119 CONG. REC. 7114 (1973) (remarks of Rep. Vanik).

27. See generally "*Crips*" *Unite*, *supra* note 16, at 190-91 n.107, 194-95 n.120.

visions of section 504.²⁸

III. Enforcement of Section 504: The Developing Standards

Following the enactment of section 504 in 1973, administrative implementation and judicial interpretation of its provisions were inextricably linked in the development of enforcement standards. The process was slow, due in part to the fact that section 504 of the Rehabilitation Act, unlike section 601 of Title VI of the Civil Rights Act of 1964, did not contain its own rulemaking authority.²⁹ In the absence of legislative specification of a form of administration, a handicapped group brought suit in *Cherry v. Mathews*,³⁰ to compel the Secretary of the Department of Health, Education and Welfare ("HEW") to issue standards governing recipients of HEW funds.³¹ Defendants argued that the statute imposed no explicit duty to issue regulations; the court, however, rejected their argument because

the plain meaning doctrine does not preclude consideration of legislative history when necessary to ascertain and effectuate an underlying congressional purpose. . . . The statute's discrimination prohibitions were certainly not intended to be self-executing. Reports from the Senate and the House on the 1974 Amendments to the Act indicate that Congress contemplated swift implementation of § 504 through a comprehensive set of regulations.³²

As a result of the suit, HEW began the rulemaking process, but its final rule implementing section 504 was not given effect until June 3, 1977,³³ nearly a year after the *Cherry* decision.

28. See generally cases cited in notes 36-43 *infra*.

29. 41 Fed. Reg. 20296 (1976). The enforcement mechanism of the anti-discrimination clause of Title VI of the Civil Rights Act of 1964 is contained within the statute. 42 U.S.C. § 2000d-1 (1976). It directs each federal department empowered to extend federal financial assistance to issue its own rules and regulations "consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken." *Id.* The rules were then to be approved by the President. *Id.*

30. 419 F. Supp. 922, 924 n.2 (D.D.C. 1976).

31. *Id.* at 923.

32. *Id.* at 924 (citations omitted).

33. 42 Fed. Reg. 22676 (1977). Section 504 enforcement powers are now vested in the Department of Justice. 45 Fed. Reg. 37620 (1980) (codified at 28 C.F.R. §§ 42.501-.540 (1980)). The Justice Department intended its final rule to be consistent with the HEW rule. *Id.* This Comment will, therefore, refer to the rule as "HEW's" and will specify distinctions only where the rules differ significantly.

Further delay in developing enforcement standards for section 504 was caused by HEW's decision to implement separately from its rulemaking a Presidential mandate which required certain other enforcement mechanisms.³⁴ Executive Order 11,914 was issued in April, 1976 requiring the Secretary of HEW to coordinate the implementation of section 504 by all federal departments and agencies empowered to grant federal financial aid and ensure the adoption of consistent practices.³⁵ As a result, no coordination or enforcement among government bodies existed until January 13, 1978, when HEW specified the responsibilities of each federal agency under section 504.³⁶ Pursuant to this rule, DOT began to develop its own guidelines regulating accessibility of mass transit to the handicapped. Before the department issued its final rule on May 31, 1979,³⁷ however, Congress amended section 504 to state, "any proposed regulation shall be submitted to appropriate authorizing committees of the Congress."³⁸

Given this long and continuing delay in providing final implementing regulations, the enforcement of the anti-discrimination provision of the Rehabilitation Act has proven problematic for the handicapped especially in the area of mass transit. Great uncertainty as to the scope of the section's protection surrounded early decisions construing the section³⁹ — and, indeed, still exists.⁴⁰ Ini-

34. 42 Fed. Reg. 22677 (1977).

35. Exec. Order No. 11,914, 41 Fed. Reg. 17871 (1976), *reprinted in* 29 U.S.C. § 794 (1976). Specifically, HEW was to establish standards for determining who is the protected handicapped class and create guidelines for determining what would constitute discriminatory practices. Furthermore, under the order, once HEW set up the coordination framework, each federal department administering federal financial assistance was required to issue rules consistent with the standards and procedures established by HEW. The order set no deadlines, however, for accomplishing its directive. *Id.*

36. 43 Fed. Reg. 2132 (1978).

37. 49 C.F.R. §§ 27.1-129 (1980).

38. Pub. L. No. 95-602, tit. I, §§ 119, 122(d)(2), 92 Stat. 2982, 2987 (codified at 29 U.S.C. § 794 (Supp. II 1978)). *See* note 120 *infra* and accompanying text.

39. *See, e.g.,* Snowden v. Birmingham-Jefferson County Transit Auth., 407 F. Supp. 394 (N.D. Ala. 1975), *aff'd without opinion*, 551 F.2d 862 (5th Cir. 1977); Bartels v. Biernat, 405 F. Supp. 1012 (E.D. Wis. 1975).

40. *See, e.g.,* American Pub. Transit Ass'n v. Goldschmidt, 485 F. Supp. 811 (D.D.C. 1980) (DOT rules challenged as arbitrary and in excess of statutory authority); Atlantis Community, Inc. v. Adams, 453 F. Supp. 825, 831 (D. Col. 1978) ("the federal statutes [UMT Act and section 504] do not provide a sufficient definition of the duties of the federal defendants to enable this court to give direction to them").

tially, defendants to suits brought by handicapped groups argued, as did the HEW in *Cherry*, that the legislation merely expressed Congressional policy and was not intended to create legal duties.⁴¹ While courts have resolved this issue in favor of the handicapped, recipients of federal funds typically have raised the following defenses, *inter alia*: first, the only duty imposed by section 504 is a duty not to discriminate by active exclusion, but no affirmative action is required;⁴² second, the section did not confer a private right of action because the doctrine of exhaustion of administrative remedies applied to bar judicial scrutiny,⁴³ third, compliance was too costly;⁴⁴ and, finally, compliance was impossible due to technological restraints.⁴⁵ Recently, transit authorities have challenged DOT implementing rules as illegal, in excess of statutory authority, procedurally defective, and arbitrary and capricious.⁴⁶

A. Affirmative Rights and a Private Cause of Action: An Early View

Even before the implementation of specific regulations by HEW and DOT, the Seventh Circuit in *Lloyd v. Regional Transportation Authority*,⁴⁷ conferred significant enforcement rights under section 504 to the handicapped. In *Lloyd*, a class action was brought by a group of handicapped individuals alleging their present inability to use the Chicago mass transit system and claiming that, unless defendants were compelled to take affirmative action, inaccessibility would continue.⁴⁸ Relying on the similarity in construction between section 504 of the Rehabilitation Act and section

41. See *Snowden v. Birmingham-Jefferson County Transit Auth.*, 407 F. Supp. 394, 396 (N.D. Ala. 1975). See also "*Crips*" *Unite*, *supra* note 16, at 190, 191 n.107.

42. See, e.g., *Southeastern Community College v. Davis*, 442 U.S. 397, 404 (1979); *United Handicapped Fed'n v. Andre*, 409 F. Supp. 1297, 1301 (D. Minn. 1976), *vacated*, 558 F.2d 413 (8th Cir. 1977). See also text accompanying notes 52-57 *infra*.

43. See, e.g., *Leary v. Crapsey*, 566 F.2d 863, 865 (2d Cir. 1977); *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277, 1284-88 (7th Cir. 1977); *Bartels v. Biernat*, 405 F. Supp. 1012, 1015-16 (E.D. Wis. 1975).

44. See, e.g., *Hairston v. Drosick*, 423 F. Supp. 180, 184 (S.D. W.Va. 1976).

45. See, e.g., *Snowden v. Birmingham-Jefferson County Transit Auth.*, 407 F. Supp. 394, 398.

46. *American Pub. Transit Ass'n v. Goldschmidt*, 485 F. Supp. 811, 821 (D.D.C. 1980).

47. 548 F.2d 1277 (7th Cir. 1977).

48. *Id.* at 1279.

601 of the Civil Rights Act of 1964,⁴⁹ the Seventh Circuit held that section 504 conferred affirmative rights to the handicapped,⁵⁰ and, moreover, a private cause of action could be implied to vindicate those rights because no administrative remedy was then available to the handicapped plaintiffs in the absence of regulations.⁵¹

In deciding the issue of whether section 504 conferred affirmative rights, the Seventh Circuit relied on the Supreme Court's decision in *Lau v. Nichols*.⁵² In *Lau*, non-English speaking children of Chinese descent sought unspecified relief under section 601 of the Civil Rights Act against a school district which they alleged had afforded them unequal educational opportunities.⁵³ The Supreme Court relied, in part, on the HEW guidelines accompanying the Civil Rights Act: "'Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program . . . the [school] district must take *affirmative steps* to rectify the language deficiency in order to open its instructional program to these students.'"⁵⁴ In accepting federal funds, the school district had contractually agreed to comply with the Civil Rights Act and its accompanying regulations and was therefore required to remedy the

49. 42 U.S.C. § 2000d (1976). See also notes 25-26 *supra* and accompanying text.

50. 548 F.2d at 1284.

51. *Id.* at 1287. In *Bartels v. Biernat*, a case antedating *Lloyd*, plaintiff class of mobility handicapped sought to enjoin a defendant transit authority from purchasing non-accessible equipment. The court noted it

need not and does not determine whether a private right of action is created by either § 504 of the Rehabilitation Act of 1973 . . . or [by] § 16(a) of the Urban Mass Transportation Act of 1964. . . . Where equitable relief is sought, as in the case at bar, it would appear that private plaintiffs with sufficient standing may obtain protection against harm from federal administrative action even though the only legally protected interests are those of the public.

Bartels v. Biernat, 405 F. Supp. at 1015-16.

52. 414 U.S. 563 (1974).

53. *Id.* at 564. The children filed suit alleging a violation of both section 601 and of the Civil Rights Act of 1964 and the fourteenth amendment. *Id.* The Supreme Court, however, based its decision that the school discriminated against the students solely on statutory grounds. *Id.* at 566. The Court noted: "It seems obvious that the Chinese-speaking minority receives fewer benefits than the English-speaking majority from respondents' school system which denies them a *meaningful* opportunity to participate in the educational program — all earmarks of the discrimination banned by the regulations [implementing the Civil Rights Act]." *Id.* at 568 (emphasis added).

54. *Id.* at 568 (emphasis added) (quoting 35 Fed. Reg. 11595 (1970)).

discriminatory effect of its practices.⁵⁵ As the *Lloyd* court noted:

Because of the near identity of language in Section 504 of the Rehabilitation Act of 1973 and Section 601 of the Civil Rights Act of 1964, *Lau* is dispositive. Therefore, we hold that Section 504 of the Rehabilitation Act, at least when considered with the regulations which now implement it, establishes *affirmative rights*. . . .⁵⁶

The *Lloyd* court also relied upon HEW's own language that the "'procedural provisions of the title VI [Civil Rights Act] regulation . . . will be incorporated by reference into the section 504 regulations for use [until it issues final regulations].'"⁵⁷

In determining whether section 504 conferred a private right of action, the *Lloyd* court noted, first, that the Supreme Court in *Lau* had permitted the Chinese-speaking students to sue as third party beneficiaries of the school district's contractual agreement to comply with the Civil Rights Act.⁵⁸ It then applied the four-prong test set out by the Supreme Court in *Cort v. Ash*:

First . . . does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purpose of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the State, so that it would be inappropriate to infer a cause of action based solely on federal law?⁵⁹

The court found that the four-prong *Cort* test had been satisfied and that a private cause of action had to be implied.⁶⁰ First, because plaintiffs were mobility-handicapped, they fell among the

55. *Id.* at 568-69.

56. 548 F.2d at 1281 (emphasis added). *Accord*, *Serna v. Portales Mun. Schools*, 499 F.2d 1147, 1153-54 (10th Cir. 1974) (bilingual program ordered for Spanish-surnamed school children suing under title VI).

57. 548 F.2d at 1284 (quoting 41 Fed. Reg. 29548 (1976)).

58. *Id.* at 1280, 1285 n.28 citing *Lau v. Nichols*, 414 U.S. at 571 n.2).

59. *Id.* at 1285 (quoting *Cort v. Ash*, 422 U.S. 66, 78 (1975)). The Supreme Court has employed the *Cort v. Ash* test in a number of instances. *See, e.g.*, *Davis v. Passman*, 442 U.S. 228, 232 (1979) (private right of action under the fifth amendment to remedy sex discrimination); *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979) (no cause of action under Freedom of Information Act to enjoin disclosure of documents); *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 37-41 (1977) (no cause of action for damages under Securities Exchange Act of 1934 against tender offeror by defeated takeover bidder).

60. *Lloyd v. Regional Transp. Ass'n*, 548 F.2d at 1287.

class to be protected by the statute.⁶¹ Second, Congress had manifested intent to create a remedy for the handicapped under section 504. A Senate Report accompanying the measure specified that the provision was consciously "patterned after" section 601 of the Civil Rights Act: "[it was] clearly mandatory in form, and such regulations and enforcement [as implemented by section 601 were] intended."⁶² This remedy had to take in the form of a private cause of action because no administrative remedy then existed.⁶³ Third, it was consistent with the underlying purposes of the scheme to imply a remedy of a private cause of action because the Rehabilitation Act expressly stated that its purpose was to include the development of solutions to existing mass transportation barriers impeding the handicapped.⁶⁴ As the *Lloyd* court observed, a private cause of action would serve to enforce regulatory standards.⁶⁵ Finally, the question of affording private remedies under section 504 was not traditionally relegated to state law because of the importance of serving the transportation needs of the handicapped on a national basis.⁶⁶

B. Scope of Duty

In addition to conferring affirmative rights and providing for a private right to judicial action under section 504, the *Lloyd* court relied on HEW's proposed rules to determine the extent of the affirmative duty of federal grant recipients not to discriminate against the handicapped. The court noted that HEW's proposed rules required that the handicapped be provided with services "as effective as [those] provided to others."⁶⁷ The proposed rules fur-

61. *Id.* at 1285.

62. *Id.* (quoting S. REP. NO. 1297, *supra* note 20, at 39-40, [1974] U.S. CODE CONG. & AD. NEWS at 6390). Similarly, the Supreme Court has held that Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1976), implied a private cause of action, noting the similarity in language with Title VI. *Cannon v. University of Chicago*, 441 U.S. 677, 699-703 (1979). Moreover, in *De la Cruz v. Tormey*, the Ninth Circuit noted that the language in Title IX which barred sex discrimination was based on Title VI. It therefore implied a private cause of action citing *Lau* as controlling. 582 F.2d 45, 60-61 (9th Cir. 1978), *cert. denied*, 441 U.S. 965 (1979).

63. *Lloyd v. Regional Transp. Ass'n*, 548 F.2d at 1286.

64. Pub. L. No. 93-112, § 2, 87 Stat. 357 (codified at 29 U.S.C. § 701(11) (1976)).

65. 548 F.2d at 1286.

66. *Id.* at 1286-87.

67. *Id.* at 1283 (quoting 41 Fed. Reg. 29561 (1976)).

ther stated that grant recipients could not provide different or separate services to handicapped persons unless necessary to achieve the goal of "equal efficacy."⁶⁸ HEW cautioned that this standard was not to be interpreted as mandating "identical result[s] . . . but must afford handicapped persons equal opportunity to obtain the same result[s]" as non-handicapped persons.⁶⁹ Nevertheless, as noted in *Lloyd*, "special efforts," that is, "genuine, good-faith progress,"⁷⁰ in planning services for wheelchair users were required by the UMT Act whose rules had been recently issued in part under the authority of section 504.⁷¹ UMT Act rules, however, did not specify a program design to meet the special requirement⁷² because "particular approaches must be determined locally."⁷³ They instead provided examples illustrating satisfactory levels of effort.⁷⁴

Thus, given the largely undefined standards implementing section 504 of "equal efficacy" and "special efforts" which took into account local needs, courts struggled in evaluating mass transit programs. *Lloyd* had relied on the similarity in construction between section 504 of the Rehabilitation Act and section 601 of the Civil Rights Act of 1964 in giving content to the former. Yet, as HEW itself stated in its notice of intent to issue proposed rules to section 504, a conceptual difference existed between the two statutes despite the similarity in language. The prohibition against racial discrimination was premised on the notion that no inherent differences existed among the races. On the other hand,

[h]andicapped persons may require different treatment in order to be af-

68. 41 Fed. Reg. 29561 (1976).

69. *Id.*

70. 548 F.2d at 1282 (quoting 23 C.F.R. § 450 app. (1977)). See note 74 *infra*.

71. 548 F.2d at 1282 (quoting 49 C.F.R. § 613.204 (1977)). The authority of the Urban Mass Transit Act regulations fell under three statutes: the Urban Mass Transportation Act of 1964, as amended, 49 U.S.C. §§ 1604, 1612 (1976), Federal-Aid Highway Act of 1976, as amended, 23 U.S.C. § 142 note (1976), and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1974). 41 Fed. Reg. 18234, 18239 (1976).

72. Appendix to 49 C.F.R. Part 613, Subpart B (1977).

73. 41 Fed. Reg. 18234, 18236 (1976).

74. The examples of special efforts were: a program for wheelchair users that will involve the expenditures of an average annual dollar amount equivalent to a minimum of five percent of funds apportioned to a city with a population greater than 200,000 under 49 U.S.C. § 1604(b) (1976); purchase of only wheelchair-accessible buses until half the fleet is accessible, or provision of comparable substitute service; and a system assuring every wheelchair user of 10 round-trips weekly on public transportation at fares comparable to those charged on standard transit buses. 49 C.F.R. §§ 613.200-204 app. (1980).

fording equal access . . . and identical treatment may, in fact, constitute discrimination. The problem of establishing general rules as to when different treatment is prohibited or required is compounded by the diversity of existing handicaps and the differing degree to which particular persons may be affected. Thus, under section 504, questions arise as to when different treatment of handicapped persons should be considered improper and when it should be required.⁷⁵

Although this HEW comment indicates the practical difficulties of implementing section 504, it overstated them to the detriment of the handicapped. Courts could not rely exclusively upon decisions under Title VI of the Civil Rights Act as precedent because, as HEW noted, different treatment of the handicapped was required under certain circumstances.⁷⁶ This same situation, however, existed in *Lau v. Nichols*,⁷⁷ the Title VI decision which served as precedent for *Lloyd*. In *Lau*, the Supreme Court noted in dicta that some kind of different treatment might be required if Chinese-speaking public school children were to be afforded equal services—for example, classes conducted in Chinese or special instruction in English.⁷⁸

HEW later noticeably changed its emphasis on different treatment for the handicapped in response to comment by handicapped groups concerned that such a provision would render the statute meaningless. In view of the handicapped, the emphasis was objectionable “both in principle and in practice: in principle, because it served to perpetuate the view of handicapped persons as ‘different,’ and in practice, because it [could result] . . . in unnecessary reliance . . . on the use of separate services to meet the requirements of the statute.”⁷⁹ Therefore, in HEW’s final rules, “different or separate services [were to be] prohibited “except when necessary” to provide equally effective benefits.”⁸⁰ Before the issuance of final rules, however, courts had to make determinations of what constituted compliance on an *ad hoc* basis; since their issuance

75. 41 Fed. Reg. 20296 (1976). The difference between sections 504 and 601 is also shown in the early attempt to amend the Civil Rights Act to include language similar to section 504's. See note 26 *supra* and accompanying text.

76. *Id.*

77. 414 U.S. 563 (1974).

78. *Id.* at 565.

79. 41 Fed. Reg. 29548, 29550 (1976).

80. 42 Fed. Reg. 22676, 22687 (1977).

courts have had to struggle with such nebulous standards as when different treatment might be "necessary."⁸¹

In one of the earliest mass transportation decisions, *Bartels v. Biernat*, a group of handicapped individuals brought a class action suit to enjoin the Milwaukee transit authority from purchasing buses alleged to be inaccessible to the mobility handicapped.⁸² The plaintiffs based their claim in part on section 504, relying also on the UMT Act.⁸³ Discussing the probability of success on the merits,⁸⁴ the court observed that, due to the "broad language" of the two statutes, it was unclear whether the handicapped plaintiffs could meet this requirement.⁸⁵ While the court concluded that the plaintiffs did not show likelihood of success on the merits,⁸⁶ it nevertheless exercised its equitable powers and granted a preliminary injunction in view of the balance of hardships and the seriousness of the issues involved.⁸⁷

Two years later, the same court confronted the question of whether it should issue a permanent injunction.⁸⁸ In the interim, the Urban Mass Transportation Administration ("UMTA") had issued additional regulations governing funding which it controlled.⁸⁹ Because section 504 served as partial authority for these regulations,⁹⁰ as did the UMT Act⁹¹ and the Federal-Aid Highway Act,⁹² the new UMT Act regulations provided the *Bartels* court with an "appropriate point of reference," in drafting a remedy.⁹³

81. See, e.g., *Atlantis Community, Inc. v. Adams*, 453 F. Supp. 825, 831 (D. Col. 1978) ("enormous difficulties . . . would be encountered by any attempt to establish the required affirmative program through the judicial process."); *Bartels v. Biernat*, 427 F. Supp. 226 (E.D. Wis. 1977) (purchase of inaccessible buses discriminatory); *Snowden v. Birmingham-Jefferson County Transit Auth.*, 407 F. Supp. 394 (N.D. Ala. 1975), *aff'd without opinion*, 551 F.2d 862 (5th Cir. 1977) (purchase of inaccessible buses not discriminatory).

82. 405 F. Supp. 1012, 1014-15 (E.D. Wis. 1975).

83. *Id.* at 1015.

84. The action was before the court as a motion for a preliminary injunction. *Id.* at 1017.

85. *Id.* at 1018.

86. *Id.*

87. *Id.* at 1018-19.

88. *Bartels v. Biernat*, 427 F. Supp. 226, 233 (E.D. Wis. 1977).

89. 49 C.F.R. § 613.204 (1977). See also 427 F. Supp. at 232.

90. See "Urban Transportation Programming for Elderly and Handicapped Persons," 41 Fed. Reg. 18234 (1976).

91. 49 U.S.C. § 1612(a) (1976).

92. 23 U.S.C. § 142 note (1976).

93. 427 F. Supp. at 233.

Under the regulations, recipients of funds allocated by the UMTA were required to use "special efforts" to ensure that the handicapped could effectively use mass transportation facilities.⁹⁴ Having determined that the transit authority had discriminated against the handicapped because the present system was inaccessible,⁹⁵ the court permanently enjoined the transit authority from acquiring inaccessible vehicles.⁹⁶ If the transit authority could demonstrate compelling necessity for immediate purchase of such vehicles, however, "such that a failure of the system would result without their purchase . . . [despite the fact] that all diligence is being used to plan, design and implement facilities and services which can be effectively utilized by mobility handicapped individuals," compliance would be excused.⁹⁷

While the *Bartels* court construed the language of section 504 and the UMT Act to be "mandatory in nature,"⁹⁸ *Snowden v. Birmingham-Jefferson County Transit Authority*⁹⁹ held otherwise. The defendant in *Snowden*, federal fund recipients, had procured buses which could not accommodate wheelchairs.¹⁰⁰ The court construed both section 504 and the UMT Act to be mere statements of federal policy, stating that the statutory language "require[d] only that 'special efforts' be made" in the planning of mass transit.¹⁰¹ In the view of the *Snowden* court, the transit authority met this standard by installing certain features which made the buses accessible to some of the ambulatory handicapped.¹⁰² The court further concluded that no active exclusion of those confined to wheelchairs existed: "Although it is necessary for [these] persons . . . to arrange for someone to help them board and alight from the bus, [they] are allowed to use the transportation vehicles in question. Thus, it cannot be said that persons who ambulate by

94. 41 Fed. Reg. 18234 (1976).

95. 427 F. Supp. at 231.

96. *Id.*

97. *Id.* at 233.

98. 405 F. Supp. at 1018.

99. 407 F. Supp. 394 (N.D. Ala. 1975).

100. The buses at issue had features which made them accessible to certain handicapped persons, but not to those confined to wheelchairs. These features included stanchions, grab-rails, step-well lighting, and power-assisted doors. *Id.* at 396.

101. *Id.* at 397 (emphasis added).

102. *Id.*

wheelchair are excluded from using the defendant's transportation system."¹⁰³

A view similar to *Snowden* was expressed in *United Handicapped Federation v. Andre*,¹⁰⁴ a decision subsequently vacated by the Eighth Circuit. In *Andre* a transit authority had contracted to buy 338 standard size buses not specially equipped for wheelchairs in addition to ten small buses which were accessible to wheelchairs.¹⁰⁵ The district court found that the special efforts requirement had been satisfied because nothing in either the UMT Act or section 504 required *every* standard-sized bus to be accessible.¹⁰⁶ *Andre*, relying on *Snowden*, concluded that no exclusion of the handicapped existed as long as the wheelchair-confined "can arrange for someone to assist them in boarding and exiting the bus."¹⁰⁷ Because the UMT Act regulations had been issued in part under section 504, however, the Eighth Circuit set aside the judgment, concluding that "§ 504 does create an affirmative duty on the part of these defendants."¹⁰⁸

Although conflicting decisions such as *Snowden*, *Andre* and *Bartels* indicate the difficulty courts have had in interpreting scant administrative guidelines, the issuance of DOT's final regulations¹⁰⁹ has made it clear that federal statutes requiring *effective* access to the mobility handicapped were intended to be enforced and thus are no mere expressions of policy.¹¹⁰ A recent Supreme Court deci-

103. *Id.* Such reasoning seems to directly contravene the policy behind the Rehabilitation Act of 1973, that is, to afford the handicapped and their families with the opportunity for greater independence. As the act's legislative history indicates:

Providing service to such [handicapped] individuals may have the eventual outcome of freeing other members of the handicapped individual's family to return to employment. . . . Thus . . . the Committee bill . . . has directed the Secretary to study methods by which such individuals . . . may be enabled to live more independently. It is the Committee's intent . . . that action recommendations will be made which will be designed to ensure that these individuals will be able to function more normally within their communities.

S. REP. NO. 318, *supra* note 17, at 19, [1973] U.S. CODE CONG. & AD. NEWS 2092-93.

104. 409 F. Supp. 1297 (D. Minn. 1976), *vacated*, 558 F.2d 413 (8th Cir. 1977).

105. *Id.* at 1300. The 338 buses had the following special provisions: non-skid floors, special grab-rails, improved lighting, safety rear doors, and improved destination signs.

106. *Id.*

107. *Id.* at 1301.

108. 558 F.2d 413, 415 (8th Cir. 1977).

109. 49 C.F.R. §§ 27.1-129 (Part 27) (1980).

110. See notes 123-41 *infra* and accompanying text.

sion, however, has cast doubt on the requirement of affirmative action in discrimination cases governed solely by section 504. In *Southeastern Community College v. Davis*, an applicant with a "serious hearing disability" who was denied admission to nursing school filed suit alleging a violation of section 504.¹¹¹ A unanimous Court wrote that "neither the language, purpose, nor history of § 504 reveals an intent to impose an affirmative action obligation on all recipients of federal funds."¹¹² While such language would seem to prove fatal to any meaningful enforcement of section 504, two factors militate against the application of *Davis* in mass transportation cases. First, the *Davis* Court failed to note the legislative history of section 504 which strongly suggests a reading of the provision with a requirement of affirmative action.¹¹³ Second, the statutory authority for the Court's decision in *Davis* consisted only of section 504.¹¹⁴ Because federally subsidized mass transportation involves capital grants under other statutes, the UMT Act or the Federal-Aid Highway Act, courts in mass transportation inaccessibility suits must consider the DOT regulations promulgated in part under these independent authorities.¹¹⁵

IV. The General Provisions of the Final HEW and DOT Rules

Although HEW and DOT have issued final rules, they have by no means eliminated major enforcement problems which have confronted courts.¹¹⁶ Indeed, HEW itself noted the difficulty in promulgating rules because of the broad language of the statute,¹¹⁷ the diversity of types of handicaps, and the wide variety of programs financed by federal funds.¹¹⁸ DOT avoided uniform na-

111. 442 U.S. 397, 400 (1979).

112. *Id.* at 411.

113. See *Lau v. Nichols*, 414 U.S. 563 (1974). See notes 49-57 *supra* and accompanying text.

114. 442 U.S. at 400.

115. *American Pub. Transit Ass'n v. Goldschmidt*, 485 F. Supp. 811 (D.D.C. 1980).

116. See notes 82-108 *supra* and accompanying text.

117. Early in the rulemaking process, HEW noted, "[w]hile we recognize that the statute creates individual rights, the statute is ambiguous as to the specific scope of these rights." 41 Fed. Reg. 20296 (1976).

118. 42 Fed. Reg. 22676 (1977). The settings where the regulations apply include: employment, *id.*, Subpart B; accessibility of facilities including transportation, *id.*, Subpart C; preschool, elementary and secondary education, *id.*, Subpart D; post secondary education,

tional rules as well, deferring instead to the "local planning process."¹¹⁹ In addition, Congress has emasculated even the broad requirements of the final rules through its refusal to authorize federal funds to make existing fixed rail transit accessible.¹²⁰ Recently, legislation has been introduced in Congress to allow localities complete discretion in deciding what accessible service to provide the handicapped.¹²¹ Such proposals for "local options" have also received the backing of the executive branch.¹²² Although the fate of the final DOT rules is uncertain, this section will briefly outline their requirements.

A. Accessibility Standards: What Constitutes Compliance?

In its final rule, HEW set different standards of accessibility depending on whether the facilities being challenged were existing or were to be newly constructed or altered.¹²³ In the case of existing facilities, the program "when viewed in its entirety" was required to be readily accessible to the handicapped,¹²⁴ although structural changes were not required if other equally effective methods of compliance were available.¹²⁵ By contrast, each newly acquired facility was required to be readily accessible.¹²⁶

id., Subpart E; and health, welfare and social services, *id.*, Subpart F.

119. DOT notes: "It would be inadvisable for DOT to attempt to formulate uniform national requirements. . . . The local planning process should have the flexibility to work out solutions that are consistent with local problems and conditions." 44 Fed. Reg. 31442, 31461 (1979). *But see* note 186 *infra* and accompanying text.

120. Department of Transportation and Related Agencies Appropriations Act of 1980, Pub. L. No. 96-131, 93 Stat. 1023, 1032. Congress amended section 504 in 1978 to require the submission of proposed implementing regulations to appropriate authorizing committees of Congress. Pub. L. No. 95-602, tit. I §§ 119, 122(d)(2), 92 Stat. 2982, 2987 (1978), *reprinted in* 29 U.S.C. § 794 (Supp. II 1978). The prohibition against using federal funds to retrofit existing fixed rail in the 1980 appropriations bill has been the only action Congress has taken under this amendment. Telephone interview with Glen Wasserman, UMTA Regional Coordinator, in New York City (Mar. 12, 1981).

121. *See* notes 184-204 *infra* and accompanying text.

122. N.Y. Times, Mar. 11, 1981, at B4, col. 5.

123. 45 C.F.R. §§ 84.22(a)-23 (1979).

124. *Id.* § 84.22. The Justice Department's final rule requires existing facilities viewed in the entirety to be "readily accessible and usable by handicapped persons." 28 C.F.R. §§ 42.520-.522 (1980) (emphasis added). This additional requirement of usability is not part of the DOT final rule. 49 C.F.R. § 27.65(a) (1980).

125. 45 C.F.R. § 84.22 (1979).

126. *Id.* § 84.23. In *Philadelphia Council of Neigh. Orgs. v. Coleman*, 437 F. Supp. 1341

This HEW distinction between new and existing facilities was followed in the subsequent DOT final rules.¹²⁷ In Subpart E, which governs mass transportation requirements,¹²⁸ DOT identified four different modes of public mass transportation: fixed route bus systems,¹²⁹ rapid and commuter rail systems,¹³⁰ light rail systems,¹³¹ and paratransit systems.¹³² In each of these areas, accessibility in existing systems is required to be viewed "in the entirety,"¹³³ and

(E.D. Pa. 1977), *motion denied sub nom.* Philadelphia Council of Neigh. Orgs. v. Adams, 451 F. Supp. 114 (E.D. Pa.), *aff'd without opinion sub nom.* Philadelphia Council of Neigh. Orgs. v. Coleman, 578 F.2d 1375 (3d Cir. 1978), a suit decided under a comparable UMT Act provision, 49 C.F.R. § 609.1 (1977), prior to final HEW rules, plaintiffs contended section 504 and the UMT Act were violated. A new commuter rail station was made accessible with ramps, grab bars, and wide-entry passageways in public restrooms. *Id.* at 1360. But 196 existing stations in the commuter network were not similarly equipped. The court held that under 49 C.F.R. § 609.13(c)(2) only new and not existing fixed facilities had to take into account the needs of the handicapped. *Id.* The UMT Act rules, unlike the HEW rule, did not require overall system accessibility for fixed structures.

127. 49 C.F.R. §§ 27.65-.67 (1980). The section entitled "existing facilities" requires:

A recipient shall operate each program or activity to which this part applies so that, *when viewed in the entirety*, it is accessible to handicapped persons. This paragraph does not necessarily require a recipient to make each of its existing facilities or every part of an existing facility accessible to and usable by handicapped persons.

Id. § 27.65(a) (emphasis added). By contrast, the section on "new facilities" reads:

Each facility or part of a facility constructed by, on behalf of, or for the use of a recipient shall be designed, constructed, and operated in a manner so that the facility or part of the facility is accessible to and usable by handicapped persons, if the construction was commenced after the effective date of this part. . . .

Id. § 27.67(a) (emphasis added).

128. *Id.* §§ 27.81-.107 (1980).

129. *Id.* § 27.85. "'Fixed route bus system' means a system of buses of any size which operate on a fixed route pattern on a fixed schedule." *Id.* § 27.5.

130. *Id.* § 27.87. "'Rapid rail' means a subway-type transit vehicle railway operated on exclusive private rights-of-way with high-level platform stations." *Id.* § 27.5.

131. *Id.* § 27.89. "'Light rail' means a streetcar-type transit vehicle railway operated on city streets, semi-private rights-of-way, or exclusive private rights-of-way." *Id.* § 27.5.

132. *Id.* § 27.91. "'Public paratransit system' means those forms of collective passenger transportation which provide shared-ride service to the general public or special categories of users on a regular and predictable basis and which do not necessarily operate on fixed schedules or over prescribed routes." *Id.* § 27.5.

133. *Id.* § 27.65(a) (1980). DOT specified additional different standards for each mode of transportation. In the case of fixed route bus systems, each system must be accessible to the handicapped who can use steps; half the peak hour bus service must be accessible within three years; accessible buses must be used before inaccessible buses during off-peak service. Moreover, all new buses must be accessible to the wheelchair handicapped. *Id.* § 27.85. As for rapid, commuter, and light rail systems, DOT requires all stations and vehicles to be accessible to the handicapped who can use steps; and "key stations"—generally stations with especially high traffic — must be retrofitted to accommodate the wheelchair handi-

time limits are specified for compliance depending on the mode of transportation varying from three to thirty years.¹³⁴ Until accessibility is achieved within these deadlines, recipients are required to use "best efforts" to make transportation accessible.¹³⁵ DOT enunciated certain additional requirements regarding interim planning after the compliance deadlines and until full accessibility is achieved: 1) recipients are to provide or assure the provision of interim accessible transportation within three years of the effective date of the regulations;¹³⁶ 2) annual expenditures for such transportation must equal an amount of two percent of the total financial assistance the recipient is allocated under section 5 of the UMT Act;¹³⁷ and 3) recipients must use "best efforts" in coordinating existing services to provide for maximum accessibility during this interim period.¹³⁸

B. Enforcement

Enforcement procedures to the DOT rules "are closely modelled on the enforcement procedures for Title VI of the Civil Rights Act of 1964,"¹³⁹ as was expressly intended by Congress.¹⁴⁰ The rules

capped. Between key stations and inaccessible stations in rapid and commuter systems, accessible connector service must be provided. *Id.* §§ 27.87, 27.89.

134. *Id.* § 27.65(c). DOT rules generally require compliance within three years. However, extensions are granted for "extraordinarily expensive" alterations as follows: 30 years for existing fixed facilities for rapid and commuter rail, *id.* § 27.87(a)(4); five years for rapid rail vehicles, *id.*; ten years for commuter rail vehicles, *id.*; and 20 years for light rail vehicles, *id.* § 27.89(a)(3).

135. *Id.* § 27.97(a) (1980).

136. *Id.* § 27.97(b)(1).

137. *Id.* § 27.97(b)(2)(i).

138. *Id.* § 27.97(b)(3). The regulations permit the recipient to coordinate *all* special services and programs including those provided by other organizations. 44 Fed. Reg. 31442, 31462 (1979).

139. 44 Fed. Reg. 31442, 31466 (1979).

140. As a Senate report indicated:

The language of section 504, in followig [*sic*] . . . [the anti-discrimination language of section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1 and section 901 of the Education Amendments of 1972, 42 U.S.C. § 1683] further envisions the implementation of a compliance program which is similar to those Acts, including the promulgation of regulations providing for investigation and review of recipients of Federal financial assistance, attempts to bring non-complying recipients into voluntary compliance through informal efforts such as negotiation, and the imposition of sanctions against recipients who continue to discriminate against otherwise qualified handicapped persons on the basis of handicap.

S. REP. No. 1297, *supra* note 20, at 40, [1974] U.S. CODE CONG. & AD. NEWS at 6390.

outline a complaint procedure and the due process to be afforded recipients before federal funds are suspended or withheld—the prescribed penalty.¹⁴¹ The DOT rules, however, are silent on the question of whether a private right to bring judicial suit exists under section 504, the UMT Act or the Federal-Aid Highway Act. Similarly, comment to the HEW final rule explains: “To confer such a right is beyond the authority of the executive branch of government.”¹⁴² While *Lloyd* had addressed this issue earlier, the court limited its ruling as applicable only until issuance of effective enforcement regulations.¹⁴³ The *Lloyd* court, however, stated in dicta: “In any event, the private cause of action we imply . . . must continue at least in the form of judicial review of administrative action” once regulations are promulgated.¹⁴⁴ Indeed, most courts ruling *after* the issuance of HEW’s final regulations have taken this view.¹⁴⁵ In *Baker v. Bell*, one of the more recent suits, mobility-impaired plaintiffs alleged that the New Orleans transit authority had violated the UMT Act and section 504 by purchasing buses they were unable to board.¹⁴⁶ The Fifth Circuit held that

141. 49 C.F.R. §§ 27.121-129 (1980). The regulations require each recipient to maintain on file information regarding the extent of its compliance. *Id.* § 27.121(b). They also provide for a periodic review by DOT officials. *Id.* § 27.123(a). If a handicapped person wishes to complain, he or she must file a written complaint to DOT within 180 days from the date of the alleged discrimination. *Id.* § 27.123(b). Such complaints will be investigated by DOT which will notify the recipient and attempt to resolve the matter “informally.” *Id.* § 27.123(c)-(d). If these informal means fail, DOT may suspend or terminate federal financial aid after reasonable notice and an administrative hearing. *Id.* §§ 27.125-27. The Department may restore a recipient to full eligibility after the conditions of the administrative order are fulfilled. *Id.* § 27.129.

142. 42 Fed. Reg. 22687 (1977).

143. *Lloyd v. Regional Transp. Auth.*, 548 F.2d at 1286 n.29.

144. *Id.*

145. See, e.g., *Kling v. County of Los Angeles*, 633 F.2d 876, 878 (9th Cir. 1980) (“all the other circuits that have considered this issue have held that there is such a right of action”); *Camenisch v. University of Texas*, 616 F.2d 127, 131 (5th Cir. 1980); *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074 (5th Cir. 1980); *NAACP v. Medical Center, Inc.*, 599 F.2d 1247, 1259 (3rd Cir. 1979); *Guertin v. Hackerman*, 496 F. Supp. 593, 594 (S.D. Tex. 1980); *New Mexico Ass’n for Retarded Citizens v. New Mexico*, 495 F. Supp. 391, 396 (D.N.M. 1980). But see *Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d 87, 89 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979) (“A private action under § 504 to redress employment discrimination . . . may not be maintained unless a primary objective of the federal financial assistance is to provide employment.” (emphasis added)); *Doe v. New York Univ.*, 442 F. Supp. 522, 523-24 (S.D.N.Y. 1978) (though HEW regulations exist, HEW must be given opportunity to demonstrate adequacy of enforcement mechanism before judicial review applies).

146. 630 F.2d 1046, 1048-49 (5th Cir. 1980).

the right to a private suit was consistent with the legislative intent of section 504.¹⁴⁷ The Supreme Court will decide this question this term in *University of Texas v. Camenisch*,¹⁴⁸ where a deaf graduate student has sued to have the university provide him with a sign language interpreter. In *Camenisch*, the Fifth Circuit held that the student had a right to bring a private suit, citing *Lloyd's* analysis of the test enunciated in *Cort v. Ash*.¹⁴⁹ The Fifth Circuit in *Camenisch* noted that the Supreme Court has already "seemingly acknowledged" the propriety of judicial consideration of section 504 suits in *Campbell v. Kruse*.¹⁵⁰ Thus, because the circuit courts have upheld the private suit under section 504, it should continue as a right under the *Lloyd* interpretation of *Cort* even though DOT and HEW have issued final regulations providing only for administrative action.¹⁵¹

C. When May Compliance Be Waived?

DOT regulations provide for a waiver of compliance with its standards for existing rapid, commuter, and light rail systems, but not for new systems or for existing fixed bus routes.¹⁵² The recipient must, however, first meet several strict requirements before it is granted a waiver of any of its obligations because the rules require alternative service "substantially as good as or better than

147. *Id.* at 1055 n.21.

148. *University of Texas v. Camenisch*, 616 F.2d 127 (5th Cir.), *argued*, 49 U.S.L.W. 3740 (Mar. 31, 1981).

149. *Id.* at 130-31 (5th Cir. 1980). See text accompanying notes 58-66 *supra*.

150. *Id.* at 131 (citing *Campbell v. Kruse*, 434 U.S. 808 (1977)). In *Campbell*, handicapped students alleged a Virginia statute providing for tuition grants denied them equal protection under the fourteenth amendment and violated section 504. *Kruse v. Campbell*, 431 F. Supp. 180, 185 (E.D. Va. 1977), *vacated*, 434 U.S. at 808 (1977). The district court held the statute unconstitutional. 431 F. Supp. at 188. The Supreme Court remanded the case to the district court for consideration of the claim based on section 504. 434 U.S. at 808.

151. The Justice Department's final rule is in agreement. See 28 C.F.R. § 42.530 (1980). The *Camenisch* court noted also that the legislative history of section 504 revealed a private cause of action was contemplated by Congress: "This approach to implementation of Section 504, which closely follows [title VI] . . . would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal government as well as a relative ease of implementation, and permit a judicial remedy through a private action.'" 616 F.2d at 131 n.6 (emphasis and words in brackets added by *Camenisch* court), quoting S. REP. NO. 1297, *supra* note 20, at 39-40, [1974] U.S. CODE CONG. & AD. NEWS 6373, 6391.

152. 49 C.F.R. § 27.99 (1980). There is no waiver provision for fixed bus routes, paratransit systems, or new facilities.

that which would have been provided absent a waiver."¹⁵³ These alternative services must be developed in consultation with handicapped groups; and public hearings at the local level must be held and documented.¹⁵⁴ Finally, when a waiver is given, a complete transition plan for an accessible system must be submitted to DOT.¹⁵⁵ In addition, recipients in the cities with the largest existing inaccessible rapid rail systems,¹⁵⁶ New York City, Chicago, Philadelphia, Boston and Cleveland, are required to spend an amount equal to at least five percent of the area's total capital grants received under section 5 of the UMT Act.¹⁵⁷

While comments to the final DOT rule caution that only "meritorious" requests for waivers will be granted,¹⁵⁸ the comments do not describe situations or enunciate factors which might warrant waiver grants. Most likely, the circumstances under which a recipient might formally seek a waiver would resemble those which confronted the courts before the issuance of final DOT regulations. Defendants to suits where the handicapped claimed inaccessible existing mass transit systems have asserted two defenses *inter alia*: expense of compliance and lack of technology necessary to comply. In *Andre*¹⁵⁹ and *Snowden*¹⁶⁰ where plaintiffs sought accessible buses, defendants asserted the defense of lack of technology. Holding for the defendant transit authority, the *Snowden* court noted that the uncontroverted affidavits of the UMTA showed that at the time of the suit, no device existed which had proved reliable for use in a standard urban transit bus and which would result in total accessibility.¹⁶¹ It therefore upheld the lack of technology defense, concluding, "[t]he Constitution as a continuously operative charter of government does not demand the impossible or the

153. *Id.*

154. *Id.*

155. *Id.*

156. 44 Fed. Reg. 31,464 (1979).

157. 49 C.F.R. § 27.99 (1980).

158. 44 Fed. Reg. 31,464 (1979).

159. 409 F. Supp. at 1300. The court observed that "no bus manufacturer in the United States presently produces a standard-size transit bus that is specially designed for total accessibility by the wheelchair handicapped with features providing safety for the handicapped and all other passengers."

160. 407 F. Supp. at 394.

161. *Id.* at 398.

impracticable.' ”¹⁶²

More recently, however, courts have rejected the argument of non-existent technology. In *Michigan Paralyzed Veterans of America v. Coleman*,¹⁶³ where a group of handicapped individuals sued under section 504, the UMT Act, and the Federal-Aid Highway Act to enjoin the purchase of inaccessible buses,¹⁶⁴ the court suggested the rationale behind earlier cases no longer applied because an on-going DOT project to develop accessible transportation — “Transbus” — seemed workable.¹⁶⁵ Similarly, in *American Public Transit Association v. Goldschmidt*¹⁶⁶ when an association of transit authorities sought to invalidate the final DOT regulations, it alleged DOT failed to recognize technological limitations as to wheelchair lifts for buses and “gapclosing” devices between subway cars and platforms.¹⁶⁷ The district court rejected this argument because the record indicated feasible lifts were currently

162. *Id.* (quoting *Yakus v. United States*, 321 U.S. 414, 424 (1943)). The court in *Bartels v. Biernat*, 427 F. Supp. 226, articulated the problem well: The Court is confronted with countervailing problems. The plaintiffs are entitled to the benefits of the mass transit system, now. The statute does not allow the County [defendants] to wait until the perfect solution is found. At the same time the technology necessary to implement some of the proposed solutions to the problem is not fully advanced. . . . *Id.*

163. 451 F. Supp. 7 (E.D. Mich. 1977).

164. *Id.* at 8-9.

165. *Id.* at 11. The court relied on a statement by DOT Secretary Brock Adams that Transbus, a project to design accessible buses, was viable: “‘A review of the record convinces me that, at a minimum the three major domestic bus manufacturers could begin Transbus deliveries within 3½ years. This date allows almost 2½ years for development before bidding would begin, and approximately 15 months thereafter before the buses are actually delivered.’” *Id.* at 11 (quoting statement of Secretary Adams, Press Conference on Transbus, May 19, 1977, at 2). “Thus, the technology which did not exist when *Andre* . . . and *Snowden* . . . were decided in the district courts now exists.” *Id.* DOT mandated that accessible buses built according to certain technical specifications be purchased after September 30, 1979. 42 Fed. Reg. 48,320 (1977) (currently codified at 49 C.F.R. § 609.15 (1980)). Transbus, however, may no longer be a project under active consideration. In 1979, DOT commissioned an independent group to study the Transbus project. COMMISSION ON SOCIOTECHNICAL SYSTEMS, NATIONAL RESEARCH COUNCIL, NRC TRANSBUS STUDY viii (Washington, D.C. 1979). The NRC study reported that when a consortium of three cities, Los Angeles, Miami, and Philadelphia, requested 530 Transbuses, no American bus company responded with bids. The report concluded that the decision of bus manufacturers not to bid was reasonable in view of “considerable financial risk.” *Id.* at 2. The report further concluded that delays in producing the bus were likely. *Id.* at 3. The final DOT rule exists independently of the earlier Transbus mandate which is still in force, although no Transbuses have been built. 44 Fed. Reg. 31,457 (1979).

166. 485 F. Supp. 811 (D.D.C. 1980).

167. *Id.* at 829.

available and because the rules did not require "gapclosing" devices unless found to be necessary for accessibility.¹⁶⁸ Moreover, the court stated: "[i]t is well settled that an agency may impose requirements entailing more advanced technology than exists at the time the requirement is adopted."¹⁶⁹ Because DOT regulations are still pending congressional review, *American Public Transit Association* may continue as good authority only if the rules are upheld by Congress.¹⁷⁰

The second defense often asserted by transit systems in section 504 suits by the handicapped concerns the untoward expense of compliance. Certainly, the early legislative history of the statute indicates an awareness of the potentially great costs involved.¹⁷¹ Moreover, a study which accompanied HEW's notice of intent to issue proposed rulemaking concluded that "the benefits forthcoming (psychic as well as pecuniary) provide a substantial offset to the costs that will be incurred."¹⁷² A number of courts have also held that compliance with section 504 was required despite great expense.¹⁷³ As the Eighth Circuit held when it vacated the district court's ruling in *Andre*, precedent supported the requirement of affirmative conduct on the part of certain entities under section 504, even when such modification became expensive.¹⁷⁴ And as noted in *Hairston v. Drosick*:

To deny to a handicapped child access to a regular public school classroom in receipt of federal financial assistance without compelling educational justification constitutes discrimination and a denial of the benefits of such pro-

168. *Id.*

169. *Id.* at 830.

170. See notes 184-97 *infra* and accompanying text.

171. As Representative Charles Vanik, in his attempt to amend the Civil Rights Act of 1964 to include a prohibition of discrimination against the handicapped, commented, "[w]hile implementation of full due process will be burdensome . . . it will serve the best interests [of the handicapped], which they are entitled to as U.S. citizens." 117 CONG. REC. H45975 (1971).

172. O'Neill, *Discrimination Against Handicapped Persons — The Costs, Benefits and Inflationary Impact of Implementing Section 504 of the Rehabilitation Act of 1973 Covering Recipients of HEW Financial Assistance*, reprinted in 41 Fed. Reg. 20,312, 20,320 (1976).

173. See, e.g., *United Handicapped Fed'n v. Andre*, 558 F.2d 413, 415-16 (8th Cir. 1977); *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277, 1281-84 (7th Cir. 1977); *Barnes v. Converse College*, 436 F. Supp. 635, 637 (D.S.C. 1977); *Hairston v. Drosick*, 423 F. Supp. 180, 184 (S.D. W.Va. 1976).

174. *United Handicapped Fed'n v. Andre*, 558 F.2d at 415.

gram in violation of the statute [section 504]. School officials must make every effort to include such children within the regular public classroom situation, *even at great expense to the school system.*¹⁷⁵

Although the Supreme Court in *Davis*¹⁷⁶ noted in dicta that under section 504 federal fund recipients were not required to bear "undue financial and administrative burdens,"¹⁷⁷ the district court in *American Public Transportation Association* held that even if section 504 does not require such affirmative action, the authority for DOT final regulations is vested in two other statutes, the UMT Act and the Federal-Aid Highway Act, which require "special efforts."¹⁷⁸ These regulations, moreover, clearly require compliance even if "extraordinarily expensive," though consideration is given in the form of a time extension of up to thirty years.¹⁷⁹

As the court observed in *American Public Transportation Association*, the early legislative history of section 504 suggested Congress did not believe the measure would *necessarily* be expensive.¹⁸⁰ Recent reports indicate, however, that Congress has reversed its position.¹⁸¹ A House report accompanying the 1980 Department of Transportation and Related Agencies Appropriation Bill¹⁸² expressed concern that the DOT regulations "might require the expenditure of vast sums with only minimal benefits to handicapped persons."¹⁸³ Under this rationale, efforts were made during

175. 423 F. Supp. 180, 184 (S.D. W.Va. 1976) (emphasis added).

176. 442 U.S. 397 (1979).

177. *Id.* at 412.

178. 485 F. Supp. 811, 824, 826 (D.D.C. 1980).

179. 49 C.F.R. §§ 27.81-.93 (1980).

180. 485 F. Supp. at 826.

181. N.Y. Times, Dec. 5, 1980, at B10, col. 1. A November, 1979 Congressional Budget Office study concluded:

the program [implementing the DOT regulations] would be very expensive — \$6.8 billion over the next 30 years — [and] relatively few handicapped persons would benefit from it. The Congress is currently considering whether to fund these changes through reductions in other transit programs or through new appropriations — or whether to enact new legislation requiring DOT or HEW to modify their rules.

Congressional Budget Office, *Urban Transportation for Handicapped Persons: Alternative Federal Approaches*, SUMMARY, reprinted in 126 CONG. REC. S8151 (daily ed. June 25, 1980) [hereinafter cited as *CBO Study*].

182. Pub. L. No. 96-131, 93 Stat. 1023, 1027 (1979). The act provided that money given should not be used to retrofit existing fixed rail transit systems under the section 504 regulations.

183. H.R. REP. NO. 272, 96th Cong., 1st Sess. 48 (1979) (Committee on Appropriations).

the final hours of the 96th Congress to pass legislation calling for "local options" in deciding what transportation services should be afforded the handicapped¹⁸⁴ as an alternative to compliance with section 504 regulations. Proponents of local options charged that the DOT rules were costly¹⁸⁵ and inflexible.¹⁸⁶ As a result, two such major plans were considered during the 96th Congress, one by Congressman James J. Howard as part of a large appropriations bill¹⁸⁷ and the other by Congressman James C. Cleveland as an amendment to the Howard bill.¹⁸⁸

The more stringent of the two proposals, the Howard "local option" plan allowed any recipient of federal funds to develop an "effective" transportation system in consultation with the local handicapped community. Such a program would be subject to approval by the Secretary of Transportation,¹⁸⁹ who would determine whether the program met specified tests of efficacy. First, the program would have to provide the handicapped with transportation covering the same service areas, having the same hours, and at the same fare as that provided the general public. The Howard option would provide for trips in the amount of time and within a transfer frequency "reasonably comparable [to the general public's trans-

184. Surface Transportation Act of 1980, H.R. 6417, 96th Cong., 2d Sess., 126 CONG. REC. H11600-01 (daily ed. Dec. 2, 1980) [hereinafter cited as Howard Proposal]; Cleveland Amendment to H.R. 6417, *Id.* at H11616-17 [hereinafter cited as Cleveland Amendment]; Zorinsky Amendment to Federal Public Transportation Act, S. 2720, 126 CONG. REC. S8150-57 (daily ed. June 25, 1980). The Congressional Budget Office study outlined two alternatives to the DOT regulations. *CBO Study, supra* note 181, at S8152. The "Taxi Plan" emphasized door-to-door separate service. *Id.* The "Auto Plan" proposed to help severely handicapped persons "purchase and specially equip their own cars." *Id.*

185. As one Congressman noted, "[t]he problem I find with the current rules of the Department of Transportation is that they are so inflexible. Does anyone think that every city in this country, no matter what it's [sic] size, has the same situation and conditions to contend with in dealing with the handicapped?" 126 CONG. REC. S8151 (daily ed. June 25, 1980) (remarks of Rep. Zorinsky).

186. "[T]he inflexibility of the Department of Transportation in applying 504 is the reason we are in the mess we are in right now. The present law [the Rehabilitation Act itself] is fundamentally not bad law." 126 CONG. REC. H11927 (daily ed. Dec. 4, 1980) (remarks of Rep. Simon).

187. Howard Proposal, *supra* note 184, at H11600-01. Indeed, certain proponents of the "local option" had formerly advocated full accessibility for the handicapped. As Congressman James J. Howard (Dem., N.J.) observed: "I am the first to admit that full accessibility has not proved workable." *N.Y. Times*, Dec. 5, 1980, at B10, col. 1.

188. 126 CONG. REC. H11616 (daily ed. Dec. 2, 1980).

189. Howard Proposal, *supra* note 184, at H11600.

portation] to the extent operationally practicable.”¹⁹⁰ Second, service would be provided regardless of trip purpose.¹⁹¹ Third, the requested transportation would be provided within twenty-four hours after receipt of request during the first two years of the program, within eight hours during the second two years, and within six hours thereafter. Fourth, “where feasible,” service would be provided to at least one person accompanying the handicapped.¹⁹² Under the Howard legislation, DOT sanctions would also be greatly relaxed; if a recipient failed to comply with the program it has devised, it would lose not less than twenty-five percent of its federal funds under the Surface Transportation Act until it “agrees to take the necessary steps to achieve compliance.”¹⁹³

The second proposed local option, the Cleveland Amendment, further diluted the DOT standards of compliance already relaxed by the Howard proposal.¹⁹⁴ Much of the language of the two measures was similar, but for two important differences. First, the Cleveland Amendment dropped the requirement for “effective” service.¹⁹⁵ Second, it established a lesser test for determining compliance. In the Howard legislation, the program would have to “ensure that no handicapped person . . . is denied effective transportation.”¹⁹⁶ By contrast, the Cleveland Amendment proposed that

190. *Id.*

191. Handicapped groups regard this stipulation to be important:

Many [present paratransit systems] . . . have trip priority designations, meaning that some individual decides whether one particular trip is as important as another. Usually medical trips have high priority and a request for such a trip may very well force the cancellation of one previously scheduled if the non-medical trip, in the opinion of the service provider, is “not as important.”

CANNON, FULL MOBILITY — COUNTING THE COSTS OF THE ALTERNATIVES 23 (1980) (published by American Coalition of Citizens with Disabilities) [hereinafter cited as FULL MOBILITY].

192. Howard Proposal, *supra* note 184, at H11600-01.

193. *Id.* at H11601. *Cf.* 49 C.F.R. § 27.129(e) (1980), the DOT regulations, which provide as a penalty “suspension or termination, or refusal to grant or continue Federal financial assistance” until the recipient complies.

194. While many handicapped groups feared the Howard legislation would “undo” section 504, they regarded the “Cleveland Amendment” with even more apprehension. Interview with James Weisman, Counsel, Eastern Paralyzed Veterans Association, in New York City (Nov. 11, 1980). One Congressman opposing the Cleveland Amendment described it as having “loophole[s] you could drive a bus with a [wheelchair] lift through.” 126 CONG. REC. H11929 (daily ed. Dec. 4, 1980) (remarks of Rep. Miller).

195. 126 CONG. REC. H11616 (daily ed. Dec. 2, 1980). *See also* 126 CONG. REC. H11926 (daily ed. Dec. 4, 1980) (remarks of Rep. Simon).

196. 126 CONG. REC. H11600 (daily ed. Dec. 2, 1980).

the Secretary approve any "program respecting handicapped persons who cannot reasonably use" generally available services.¹⁹⁷

Despite wide Congressional endorsement of local options, neither the Howard plan nor the Cleveland amendment is now law.¹⁹⁸ Handicapped groups have opposed such options vigorously for several reasons. First, they fear that enforcement, already lax under present DOT regulations, will become meaningless should localities be allowed to set their own standards of accessibility.¹⁹⁹ Second, although local option proponents stress "flexibility" in planning,²⁰⁰ this benefit would inure only to the transit operator and not to the handicapped constituency.²⁰¹ Third, "local options" may be much more costly than current estimates indicate.²⁰² Fourth, the opera-

197. *Id.* at H11616.

198. The Cleveland Amendment narrowly lost by two votes. 126 CONG. REC. H11629 (daily ed. Dec. 2, 1980). The Howard proposal, part of his larger \$22 billion appropriations package for mass transit aid, was approved by the House. The measure was defeated in the Senate, however, because many members of the lame duck session felt the new Congress should have the opportunity to study the issue. N.Y. Times, Dec. 14, 1980, at A45, col.1. It is evident, though, that efforts to change the DOT section 504 regulations will not have died with the adjournment of the 96th Congress. President Reagan's administration has "strongly urged" that localities and not the federal government should decide how to provide public transportation for the handicapped. N.Y. Times, Jan. 7, 1981, at B5, col. 1. Unless some local option is adopted, the Reagan administration believes the implementation of DOT regulations could increase fares by as much as \$38 per ride. *Id.* See CBO Study, *supra* note 181, at S8152. On the local New York City level, too, legislation such as the Howard and Cleveland proposals has engendered strong governmental support. N.Y. Times, Dec. 5, 1980, at B10, col. 1.

199. As an opponent to the Cleveland Amendment argued:

[I]n 1970 this body urged local officials across this Nation [through passage of the Urban Mass Transportation Act] to provide transportation for the handicapped; and what was the result of that urging by this body? The result was absolutely nothing. Those local officials did not provide help; and so when we are urged to turn this over to local officials and have faith in them, I suggest the record in the particular area has not been a good one.

126 CONG. REC. H11926 (daily ed. Dec. 4, 1980) (remarks of Rep. Simon).

200. See note 186 *supra* and accompanying text.

201. Local option opponents base this conclusion on current paratransit systems operated pursuant to 1976 UMTA "special efforts" requirements. FULL MOBILITY, *supra* note 191, at xiii. Current systems are operated under considerable budgetary restraints and, therefore, require advance registration and notice. They also have restrictions on usage, service area, hours of operation, trip purpose and fare. *Id.*

202. The handicapped base their conclusion that the cost of local options has been underestimated on the study conducted by the Congressional Budget Office (CBO) which analyzed options to implementing the DOT regulations. *Id.* at ix. See CBO Study, *supra* note 181. The CBO concluded that a total of 1,654 accessible paratransit vehicles were necessary to serve the entire United States at a cost of \$120 million per year. As the handicapped

tional difficulties such as schedule disruptions which transit authorities claim will result from making an entire system accessible may be overstated or even illusory.²⁰³ Finally, local options will result in discriminatory transit plans, contrary to section 504.²⁰⁴

V. New York City's Predicament

Whether a locality should be allowed to develop its own transportation policy and possibly violate the statutory rights of the handicapped, the issue facing the Congress, is also the problem facing New York City. As one of the five largest cities in the United States with an inaccessible existing mass transit system,²⁰⁵ New York City has a system which encompasses several modes of transportation: rapid rail, fixed route buses, and commuter rail.²⁰⁶

noted, this amounted to an average of 33 vehicles per state — hardly enough to provide adequate service; the CBO study, moreover, assumed each handicapped passenger would only take five one-way trips per month. *Id.* at 13.

203. FULL MOBILITY, *supra* note 191, at 7-8. Indeed, the Santa Clara County Transit District which operates bus lifts with moving handrails "has observed a decrease in dwell time by allowing some semi-ambulatory elderly people to use the lift instead of waiting for them to climb laboriously up the steps." *Id.* at 8. Moreover, the type of lift employed may make a difference in whether a transit system experiences operational difficulties. For example, in New York, the MTA plans to purchase a lift which operates from the rear door, thus requiring the driver to leave his seat. Interview with Robert A. Olmsted, Assistant Director of Planning, MTA, in New York City (Mar. 4, 1981). By contrast, in Seattle, Washington, the transit system has acquired buses with lifts which operate from the front door and which can be operated mechanically by the driver from his seat. Seattle Post-Intelligencer, Dec. 28, 1980, § H at 6, col. 1. These special buses now serve 1,500 to 2,000 disabled persons a month. *Id.*

204. FULL MOBILITY, *supra* note 191, at 21-23. The handicapped note that current restrictions placed on separate services such as pre-registration with government or social agencies and certification by physicians mean that mass transit service is not made available to visitors who do not live permanently in the service area. *Id.* at 22. Also, though systems may purport to have no restrictions as to trip purpose, they may nevertheless impose them by virtue of the fact that they are oversubscribed. *Id.* at 23. These, among others, are examples of denying equal transit service to individuals solely on the basis of their handicap in direct contravention of section 504. *Id.* See also text accompanying note 79 *supra*.

205. 44 Fed. Reg. 31,464 (1979).

206. Rapid rail facilities include the 230 route mile system known as the New York City subways and the 14 route mile system operated by the Staten Island Rapid Transit Operating Authority. Fixed route bus systems include 2,500 vehicles owned by the City of New York and operated by the New York City Transit Authority; the 2,060 vehicles owned by New York City and operated by the Manhattan and Bronx Surface Transit Operating Authority; and the 327 vehicles largely owned by Nassau County and operated by the Metropolitan Suburban Bus Authority, an MTA subsidiary. Commuter rail includes the Long Island Rail Road (LIRR), Conrail's Hudson, Harlem and New Haven lines, and the New York portion of Conrail's Hoboken lines. The LIRR is a wholly-owned subsidiary of MTA, while the three

MTA has prepared two reports to examine the feasibility of providing accessible transportation. The first,²⁰⁷ prepared in response to section 321 of the Surface Transportation Assistance Act of 1978,²⁰⁸ analyzed only the rapid and commuter rail systems.²⁰⁹ The second²¹⁰ was submitted by MTA in fulfillment of the DOT section 504 regulations which required development of a "transition plan" defining a program to achieve accessibility.²¹¹ In this second study, MTA relied on the section 321 report but also covered the remaining modes of transportation under its jurisdiction.²¹² On the basis of these reports, MTA approved making its buses accessible but expressly disapproved retrofitting its rail systems,²¹³ concluding:

The additional capital and operating costs are enormous, especially in light of the projections of few additional handicapped riders. . . . [T]he accessibility requirements raise the expectations of handicapped persons beyond what is reasonably achievable — both physically and fiscally — and to that extent represent a cruel hoax on the handicapped community.²¹⁴

Conrail lines are under contract to MTA. New York Mass Transportation Authority, *Transition Plan*, *supra* note 3, at 7-8.

207. Metropolitan Transportation Authority, New York City Transportation Authority, and Staten Island Transit Operating Authority, *Operator's Comments on Section 321 Rail Retrofit Evaluation Studies* (Mar. 1980) [hereinafter cited as *Operator's Comments*]. This document accompanied a study conducted by consultants to the UMTA. New York City Transit Authority, *Section 321(a) Rail Retrofit Evaluation* vii (January 1980) [hereinafter cited as *Section 321 Report*]. The *Section 321 Report* states. "This is a technical report and . . . should not be construed to represent policies of the Board of the New York Metropolitan Transit Authority. *Id.* The Operator's Comment, however, expressly represents MTA's views. *Operator's Comments*, *supra* at 2.

208. Surface Transportation Assistance Act of 1978, Pub. L. No. 95-599, § 321, 92 Stat. 6637 (codified at 49 U.S.C. § 1612 note (Supp. II 1978)).

209. *Operator's Comments*, *supra* note 207, at 2.

210. *Transition Plan*, *supra* note 3.

211. 49 C.F.R. § 27.103 (1980). Certain members of the New York City handicapped community argue that the MTA did not fully meet the DOT rules governing the transition plan which require that federal fund recipients hold "public hearings" regarding proposed plans. See 49 C.F.R. § 27.107(c) (1980). They argue, instead, that the so-called "public forums" held by the MTA included only presentations by the transit operators with no participation by the MTA board. Moreover, the operators did not furnish the public with copies of the transition plan. Interview with James Weisman, Counsel, Eastern Paralyzed Veterans' Ass'n in New York City (Mar. 10, 1981).

212. See note 206 *supra*.

213. Letter from Richard Ravitch, Chairman of MTA, to Neil Goldschmidt, Secretary of Transportation (Dec. 31, 1980), *reprinted in Transition Plan*, *supra* note 3.

214. Letter from John D. Simpson, Executive Director of MTA to Theodore C. Lutz, Administrator, Urban Mass Transportation Administration (Mar. 3, 1980), *reprinted in Operator's Comments*, *supra* note 207.

By contrast, the Citizens' Advisory Council, a coalition of handicapped groups, drafted an alternative transition plan "within the framework"²¹⁵ of the DOT regulations — in essence, advocating a local option. A comparison between the MTA *Transition Plan* and the *Alternative Plan* is difficult because the scope of each is different. As required by the DOT regulations,²¹⁶ MTA studied the entire mass transit system it operates, whereas the handicapped group, convened by the MTA, was instructed to consider²¹⁷ only rapid rail in conjunction with fixed route bus systems and para-transit vehicles,²¹⁸ thereby omitting commuter rail. Yet, a comparison between the two plans may be useful in evaluating the efficacy of the DOT regulations, the scope of MTA's vision — and, indeed, the viability of section 504 itself.

A. MTA's Findings

DOT regulations specify three main subjects of compliance for existing rapid and commuter rail systems: stations, vehicles, and connector service between accessible and inaccessible stations.²¹⁹ Although DOT rules generally regard existing facilities as accessible when viewed in their "entirety,"²²⁰ they further specify different, more detailed standards for each of these three areas. In the case of a system's stations, all must be made accessible to the handicapped who can use steps;²²¹ and "key stations" must be made accessible to wheelchair users.²²² Applying DOT's narrow

215. Joint New York City Section 504 Transportation Citizens' Advisory Committee, *Alternative Transition Plan for Compliance with USDOT Section 504 Regulations* 1 (Oct. 1980) [hereinafter cited as *Alternative Plan*].

216. 49 C.F.R. § 27.103(c)(2) (1980).

217. Interview with James Weisman, Counsel, Eastern Paralyzed Veterans' Ass'n, in New York City (Mar. 10, 1981). See also *Alternative Plan*, *supra* note 215, at 1.

218. *Alternative Plan*, *supra* note 215, at 2.

219. 49 C.F.R. § 27.87 (1980).

220. *Id.* § 27.87(a).

221. *Id.* § 27.87(a)(1).

222. *Id.* DOT defines "key stations" narrowly. In the case of rapid rail, key stations include:

(A) Stations where passenger boardings exceed average station boardings by at least 15 percent; (B) Transfer points on a rail line or between rail lines; (C) Major interchange points with other transportation modes; (D) End stations, unless an end station is close to another accessible station; (E) Stations serving major activity centers of the following types: employment and government centers, institutions of higher learning, and hospitals or other health care facilities; or (F) Stations that are

definitions for key stations, the MTA determined that 255 of 487 of its rapid rail stations had to be made fully accessible²²³ and recommended the installation of 762 elevators,²²⁴ a figure which included back-up elevators to be used if a so-called "basic elevator" broke down.²²⁵ MTA further found eighty-two commuter rail stations to be "key"²²⁶ and suggested that alterations such as ramps, elevators, and accessible restrooms and ticket windows be made to these stations.²²⁷ At stations where the height of the car entrance is not level with the platform, MTA specified replacement of low level platforms with full length high level platforms.²²⁸

In addition, DOT requires that vehicles or subway cars be made accessible to the handicapped who can use steps, but that only one vehicle per train need be accessible to wheelchair users.²²⁹ The MTA's Operator's Comment, however, went beyond the DOT requirement by advocating that *all* of its 6,600 subway cars be made accessible.²³⁰ In addition, it recommended the installation of a de-

special trip generators for sizeable numbers of handicapped persons.

For commuter rail systems, key stations are those that are: (A) Transfer points on a rail line or between rail lines; (B) Major interchange points with other transportation modes; (C) End stations, unless an end station is close to another accessible station; (D) Stations serving major activity centers of the following types: employment and government centers, institutions of higher learning, and hospitals or other health care facilities; (E) Stations that are special trip generators for sizeable numbers of handicapped persons; or (F) stations that are distant from other accessible stations.

Id. § 27.87(a)(1)(i)-(ii).

223. *Transition Plan*, *supra* note 3, at 88, 17.

224. *Operator's Comments*, *supra* note 207, at 28. Other improvements to key stations included ramps, the designation and marking of a wheelchair accessible pathway from street to platform with the removal of all barriers along that pathway, and installation of supplementary closed circuit television where needed for improved security. *Transition Plan*, *supra* note 3, at 88.

225. *Operator's Comments*, *supra* note 207, at 29-30.

226. MTA identified as "key stations" 47 on the LIRR line, *Transition Plan*, *supra* note 3, at 112; 28 on the Conrail Hudson, Harlem and New Haven Lines, *id.* at 119, and seven on the Conrail Hoboken line, *id.* at 125.

227. *Id.* at 105.

228. *Transition Plan*, *supra* note 3, at 106-07. The earlier *Section 321 Study* had advocated construction of "high-level short length mini-platforms." But these were rejected in favor of full length platforms in view of the possible hazards of "double-stopping" should an accessible car not be properly aligned at a mini-platform. *Id.* at 106.

229. 49 C.F.R. § 27.87(a)(2) (1980).

230. *Operator's Comments*, *supra* note 207, at 12. MTA reasoned:

Because trains operate in either direction, and because trains are disassembled and reassembled frequently to remove cars for inspection and/or repair, to change train lengths, etc., *all* cars must be made accessible in order to assure that there will be

vice known as a "tie down" as part of this retrofitting effort,²³¹ although such devices were only required in *new vehicles*.²³²

accessible car [sic] at a known predetermined position in the train.

Id. at 23 (emphasis in original). In its *Transition Plan* the MTA subsequently revised its position and called for retrofitting three-fourths of the cars under the same rationale. It did not, however, account for the reduction of its estimate. *Transition Plan*, *supra* note 3, at 84-86. Retrofitting involves the installation of non-slip floor material, audible and visible door alarms, priority seating signs, and wheelchair tiedowns. *Id.* at 85.

231. *Operator's Comments*, *supra* note 207, at 19-20. See also *Transition Plan*, *supra* note 3, at 85.

232. 49 C.F.R. § 27.87(b) (1980). The MTA consultant in its *Section 321 Report* recommended the installation of a second device optional in existing cars — "gapfillers," devices used to close the gap between vehicles and station platforms. *Section 321 Report*, *supra* note 207, C app. at C-1. The MTA, however, has expressly rejected the use of car-borne gapfillers as "undeveloped, unproven, and subject to many potential operational and safety hazards. . . ." The MTA noted, also, the "very high" estimated capital and operational costs. *Transition Plan*, *supra* note 3, at 87. As noted by DOT, "gap closing devices, if determined to be necessary for accessibility] . . . are not required for vehicles for which solicitations are issued before January 1, 1983." 49 C.F.R. § 27.87(b) (1980). This provision was challenged on the ground of technological impossibility. See *American Public Transit Ass'n v. Goldschmidt*, 485 F. Supp. at 828-30. See also notes 166-70 *supra* and accompanying text. The MTA has also objected to the devices in view of the operational difficulties:

It is assumed that the gapfiller will not be used except on demand when needed by a handicapped passenger. When a train arrives at an accessible station, a handicapped person waiting in the "accessible zone" needing the device, would be observed by the conductor who would be prepared to activate the gapfiller on the designated accessible car after the train's doors have been opened. As exiting passengers would have no way of knowing a handicapped passenger wishes to board, they would first have to be allowed to exit. Assuming no interference from passengers who wish to board (who would be directed to, or voluntarily seek to use, adjacent doors), the conductor can then activate the gapfiller. Audiovisual warning devices would warn other passengers that the device is in motion and not to use the door in question. The handicapped passenger could then board and, if a wheelchair user, would seek the wheelchair berthing position. If the car is crowded, as would be the normal rush hour case, crowd impedence will make it difficult for the wheelchair passenger to place himself in a secure position in the proper location, further increasing dwell time. Upon completion of this boarding procedure the gapfiller would be retracted.

When the wheelchair passenger wishes to get off at a particular station, he or she will have to actuate a signal device to alert the conductor. Upon stopping and opening the train's doors, exiting passengers would first have to be allowed to exit. Assuming entering passengers shift to other doors, the conductor would deploy the gapfiller, observe the exiting handicapped passenger, retract the device, and if all goes well, the train can depart.

Operator's Comments, *supra* note 207, at 16-17. The MTA believes this process coupled with use of tiedowns could reduce the capacity of the subway system in rush hour by 30 to 40 percent. N.Y. Times, Sept. 20, 1980, at A17, col. 3. The MTA has, instead, proposed to hire 2,160 attendants to man 460 platforms around the clock to aid wheelchair passengers. *Operator's Comment*, *supra* note 207, at 17-18. Gapfillers which are not car-borne have been in use at the Fourteenth Street Lexington Avenue IRT Station and the South Ferry Seventh

DOT rules require accessibility no later than three years after the effective date of the regulations, July 2, 1979, although the time limit is extended for extraordinarily expensive structural changes to thirty years for existing fixed facilities, five years for rapid rail vehicles, and ten years for commuter rail vehicles.²³³ Furthermore, steady progress is required in each instance.²³⁴ MTA estimated that over the twenty-nine year period of the transition plan, capital costs for fixed facilities and vehicles would total some \$1.4 billion. It further estimated the increase in annual operating and maintenance costs attributable to compliance ranging from twenty-three million dollars per year in the early years to more than \$100 million after the year 2000.²³⁵ In view of one MTA projection that as few as 413 wheelchair handicapped would use an accessible system on any given day,²³⁶ MTA regarded the cost as

Avenue IRT Station for many years without difficulty. Interview with James Weisman, Counsel, Eastern Paralyzed Veterans' Ass'n, in New York City (Nov. 11, 1980).

233. 49 C.F.R. § 27.87(a)(4) (1980).

234. *Id.*

235. *Transition Plan*, *supra* note 3, at 58. The estimates are in 1980 dollars.

236. N.Y. Times, Sept. 20, 1980, at 17, col. 4. MTA based this figure on the experience of San Francisco's Bay Area Rapid Transit System (BART). It must be noted, however, that while BART itself is accessible, there is low ridership because the system serves a very limited area and connector services are inaccessible. Interview with James Weisman, Counsel, Eastern Paralyzed Veterans' Ass'n, in New York City (Nov. 11, 1980). The *Transition Plan* itself contains no statement on projected ridership; the MTA's Operator's Comments, however, estimates there are approximately 380,000 persons with "limited transit mobility." Of this number, approximately 117,000, including 22,800 wheelchair bound, are presently excluded from public transportation. A consultant to the MTA estimated that some 1,824 are "potential transit riders" who would use an accessible *rapid transit* system. Under this projection, the MTA estimated the operation cost at \$51 to \$171 per wheelchair subway ride. As of March 1980, the cost per ride was approximately 75¢. *Operator's Comments*, *supra* note 207, at 10-11.

Studies of ridership such as those conducted by the MTA may be flawed. Interview with James Weisman, Counsel, Eastern Paralyzed Veterans' Ass'n, in New York City (Nov. 11, 1980). As an independent 1979 report by the National Research Council indicated, *all* the major studies attempting to identify the transportation handicapped have "serious methodological problems." COMMISSION ON SOCIOTECHNICAL SYSTEMS, NATIONAL RESEARCH COUNCIL, NRC TRANSBUS STUDY 40 (1979). The NRC study criticized the ridership studies because they required those polled to identify their problems in using transit, thus "encourag[ing] them to report minor problems as barriers to transit use." *Id.* For example, the most influential of these studies, performed by Grey Advertising, a consultant to the UMTA in 1976-78, attempted to identify those with *functional* problems in the use of conventional mass transportation. *Id.* at 42. However, the Grey study concluded that *non-functional* problems such as the fear of getting lost or mugged, the inability to calculate or pay fares, or the fear of slipping on floors were also important barriers to use. *Id.* at 47 citing GREY ADVERTISING,

excessive.

B. The Citizens' Advisory Committee Alternative Plan

MTA criticized the DOT regulations as "extremely rigid and provid[ing] little flexibility in developing cost-effective plans to serve handicapped persons."²³⁷ Clearly, the Citizens' Advisory Committee Alternative Plan also implicitly took this position—albeit in an attempt to salvage the right of New York City's handicapped to accessible mass transportation. Although its proposal rejected certain DOT requirements,²³⁸ the Committee arrived at a more practical and less costly plan than did MTA through creative use of existing systems, supplementing them with paratransit and fixed route bus systems and, only when necessary, with structural alterations.

The most significant departure of the alternative plan from DOT's regulations occurred in the Committee's rejection of the requirement of accessibility for all "key stations." While MTA had designated 255 stations as "key" under DOT standards,²³⁹ the alternative plan advocated that only 134 stations be considered "key" and therefore made accessible. The Committee designated fewer key stations because of the existence of parallel bus service, the high cost of accessibility improvements, and comparatively low ridership in certain key stations.²⁴⁰ Despite the reduced number of accessible stations, the alternative plan concluded that effective service would nevertheless result if the key stations were used in combination with accessible bus service.²⁴¹

INC., SUMMARY REPORT OF THE NATIONAL SURVEY OF TRANSPORTATION HANDICAPPED PEOPLE (1978)).

237. *Operator's Comments*, *supra* note 207, at 45.

238. *Alternative Plan*, *supra* note 215, at 4.

239. *Transition Plan*, *supra* note 3, at 88. See definition of "key station" in note 222 *supra*.

240. *Alternative Plan*, *supra* note 215, at 4. In arriving at the lower figure, the Committee rejected only one of DOT's criteria for determining key stations, namely, stations where passenger boardings exceed average stations boardings by 15%. Such stations were all located in Manhattan where the subway routes are duplicated by bus routes. Interview with James Weisman, Counsel, Eastern Paralyzed Veterans' Ass'n, in New York City (Mar. 10, 1981).

241. *Id.* at 5-6. The plan further concluded that accessibility to transportation at these key stations be achieved at the rate of four per year over the next 30 years. *Id.* at 3. This, in the Committee's view, would satisfy the "steady progress" requirement of the DOT regulations. 49 C.F.R. § 27.87(a)(4) (1980).

As for the accessibility of the rapid transit vehicles themselves, the alternative plan rejected MTA's specifications of back-up elevators, gapfillers and wheelchair tiebacks because none were required by DOT regulations.²⁴² The plan, however, did recommend that tiebacks be installed in newly purchased vehicles.²⁴³ Finally, the success of the alternative plan hinged on the development of accessible connector service, required by DOT regulations between accessible and inaccessible subway stations. DOT specified that "connector service, when combined with the key stations, must provide a level of service reasonably comparable to that provided for a non-handicapped person."²⁴⁴ Both MTA²⁴⁵ and the Committee²⁴⁶ proposed to accomplish this by means of accessible fixed route buses. The Committee recommended further that, until accessible transportation is achieved, interim accessible transportation as required by DOT²⁴⁷ be extended through accessible fixed route buses, paratransit service, and existing specialized transportation provided by third parties.²⁴⁸ Thus, the Committee recommended that accessibility of New York City's mass transit system

242. *Alternative Plan*, *supra* note 215, at 5-6. The plan misstated DOT regulations when it commented: "The period of compliance for the subway system is 30 years; subway cars are replaced every 35 years. The . . . Committee maintains that no subway vehicles should be retrofitted with wheelchair tie-down devices." *Id.* at 6. In fact, DOT regulations require a five year deadline for retrofitting rapid rail vehicles. The 30 year figure refers to an extension granted for existing fixed facilities. 49 C.F.R. § 27.87(a)(4) (1980).

243. *Alternative Plan*, *supra* note 215, at 6.

244. 49 C.F.R. § 27.87(a)(3) (1980).

245. *Transition Plan*, *supra* note 3, at 31.

246. *Alternative Plan*, *supra* note 215, at 6. In addition, the Committee recommended the system occasionally be supplemented by paratransit vehicles. MTA presently has 4,560 buses. *Transition Plan*, *supra* note 236 at 64. Relying on this figure, the Committee recommended that 2,280 buses be made accessible. *Alternative Plan*, *supra* note 215, at 9. DOT, however, requires half the number of *peak hour* buses to be accessible. 49 C.F.R. § 27.85(a)(ii) (1980). Projecting a peak hour fleet of 3,420 buses, the MTA, by contrast, recommended 3,576 buses be made accessible by 1990, thus far exceeding DOT requirements. *Transition Plan*, *supra* note 3, at 66.

247. 49 C.F.R. § 27.97 (1980). DOT requires interim accessible transportation if the requirements for program accessibility are not met within three years of the effective date of the regulations (that is, by July 1982). *Id.* § 27.97(a)-(b). Until accessibility is achieved, the recipient is obliged to spend on interim accessible transportation two percent of its financial assistance under § 5 of the UMT Act. *Id.* § 27.97(b)(2). In fiscal year 1980, this two percent figure amounted to some \$4.33 million in the New York urban region. *Transition Plan*, *supra* note 3, at 37.

248. *Alternative Plan*, *supra* note 215, at 3-4. The MTA's interim plan calls for similar services. *Transition Plan*, *supra* note 3, at 37.

be achieved primarily through changes on fixed route buses and certain strategic subway stations,²⁴⁹ rather than by retrofitting all key stations as required by DOT.²⁵⁰ Because it recommended flexibility in meeting the transportation needs of the handicapped, it estimated the capital cost at the comparatively low figure of \$13.754 billion per year over the thirty year transition period.²⁵¹

Although the Committee felt it necessary to liberalize some of DOT's rules — in essence, creating a local option, many of the handicapped groups which comprised the Committee viewed Congressional efforts to change section 504 regulations to permit increased paratransit systems with apprehension.²⁵² Indeed, they felt that such unilateral changes would weaken the rules unnecessarily because most mass transportation systems do not require such extensive and costly alterations to existing fixed structures.

C. Effects of MTA's Action

When the MTA first announced its decision not to comply with section 504 rules, federal officials expressed concern that such an action could serve as incentive for the four other major cities with non-accessible subways, Chicago, Philadelphia, Cleveland, and Boston, to take similar action.²⁵³ In fact, the American Public Transit Association, the national organization of bus and subway systems, endorsed MTA's refusal and unanimously urged other cities to follow New York's example,²⁵⁴ though none to date have done so. MTA subsequently withdrew its refusal to comply and instead took several steps which indicated a softening of its position. First, it requested a six-month extension in order to reach a com-

249. *Alternative Plan*, *supra* note 215, at 3-4.

250. 49 C.F.R. § 27.87(a)(1) (1980).

251. *Alternative Plan*, *supra* note 214, at 9. The Committee plan used the *Section 321 Report's* estimates to approximate the cost of retrofitting the key subway stations. *Id.* at 8. The Committee relied on DOT's cost estimates for determining capital improvements to newly purchased subway cars and buses and increased annual operating and maintenance costs of \$2.131 million once accessibility is achieved. *Id.* at 8-10. *See* notes 229-31 *supra* and accompanying text for MTA's specifications which exceed DOT's requirements. *See* text accompanying notes 207-17 *supra* for differing scopes of the MTA's and the Citizen Advisory Committee's studies. *See also* note 241 *supra* for Committee's misapplication of DOT regulations.

252. *See* notes 184-99 *supra* and accompanying text.

253. N.Y. Times, Sept. 20, 1980, at A1, col. 4.

254. N.Y. Times, Oct. 19, 1980, at A33, col. 1.

promise.²⁵⁵ Next, the MTA complied with DOT regulations by submitting a transition plan by the January 2, 1981, deadline; having fulfilled this requirement, the transit authority has been granted a six-month extension for submission of an alternative to the rail portion of this plan.²⁵⁶ Finally, the MTA has announced its intention to seek a formal waiver of compliance with the DOT regulations rather than forfeit federal assistance.²⁵⁷

Although the MTA has retreated from its initial refusal to comply, its action clearly dramatized to Congress the potential hardships DOT regulations impose on large urban centers such as New York,²⁵⁸ and such a showing could persuade Congress to reject the regulations which have taken DOT so long to develop. Given the fiscal policies of the Reagan administration which has advocated massive budget cuts in the area of transportation,²⁵⁹ accessibility of mass transportation to the mobility handicapped could be seriously jeopardized.

D. Recourses of the Handicapped in New York City

Presently, handicapped groups in New York have initiated three accessibility suits against the MTA. Two are class actions²⁶⁰ alleging that the MTA: 1) failed to develop plans that would allow the class to use public transportation; 2) failed to implement plans once approved by federal defendant agencies; 3) ordered an "extraordinarily large" number of inaccessible buses (835) in 1979 with the express purpose of circumventing DOT regulations; 4) failed to consult with wheelchair users in developing and implementing plans; 5) failed to expend the amount required by federal

255. *Id.*

256. Letter from Richard Ravitch, MTA Chairman, to Neil Goldschmidt, DOT Secretary (Dec. 31, 1980), reprinted in *Transition Plan*, *supra* note 3. But see note 211 *supra*.

257. *Id.*

258. One Congressman who spoke in support of the local option noted: the Howard substitute offers a viable approach to compliance with section 504. . . . This is of utmost importance to the handicapped residing and visiting the New York City metropolitan area because the MTA has already announced that it simply cannot afford to comply with current law and its future funding is now in jeopardy.

126 CONG. REC. H11954 (daily ed. Dec. 4, 1980) (remarks of Rep. Lent).

259. N.Y. Times, Feb. 20, 1981, at A12, col. 3. The Reagan administration has recommended budget cuts of \$96 million in 1982 to \$1.4 billion by 1986. *Id.*

260. Disabled In Action v. Goldschmidt, No. 80-1862 (S.D.N.Y., filed Aug. 21, 1980); Dopico v. Goldschmidt, No. 80-4562 (S.D.N.Y., filed Aug. 7, 1980).

law;²⁶¹ and 6) overstated the amounts actually spent in reports to federal defendants by misclassifying projects as "special efforts" when many projects benefitted the public as a whole and provided no special benefit to wheelchair users.²⁶² Both complaints are grounded on the DOT regulations implementing section 504, the UMT Act and the Federal Aid Highway Act,²⁶³ and therefore, resolution of the two cases may be delayed due to the uncertain status of the DOT regulations. Both complaints allege, in addition, violation of the equal protection and due process clauses of the fifth and fourteenth amendments to the United States Constitution.²⁶⁴ Courts, however, have held the protection afforded the handicapped under the Constitution to be less extensive than that afforded by statute.²⁶⁵ It would therefore be necessary for the two

261. 49 C.F.R. §§ 613.200-204 app. (1980). Under the DOT "special efforts" requirement, localities must spend a minimum of five percent of their section 5 UMT Act allocation on accessibility projects. MTA reports that this would amount to some \$10.8 million annually. Letter from Robert A. Olmsted, Assistant Director of Planning, MTA, to author (Nov. 7, 1980). MTA has spent no money to date in fulfillment of this "special effort" requirement. Interview with Robert A. Olmsted, Assistant Director of Planning, MTA, in New York City (Mar. 4, 1981). The transit authority, however, has developed two plans which it hopes to implement. The first, is an advance reservation paratransit system with an estimated operational cost of some four million dollars per year. The implementation of this system has been delayed because the labor unions involved have not yet waived their right to object to the hiring of non-union workers. *Id.* The second "special efforts" plan recommended the purchase of 100 fixed route mini-buses. When bids were received, however, the MTA discovered they were double the estimated cost. *Id.* MTA decided instead to purchase 200 full-size buses equipped with wheelchair lifts. *Id.* These buses were part of a large shipment which subsequently was halted due to "structural difficulties" which resulted in cracks in the bus frames. N.Y. Times, Dec. 10, 1980, at B1, col. 6.

262. *Disabled in Action v. Goldschmidt*, No. 80-1862, at 17; *Dopico v. Goldschmidt*, No. 80-4562, at 15.

263. *Disabled in Action v. Goldschmidt*, No. 80-1862, at 4; *Dopico v. Goldschmidt*, No. 80-4562, at 3.

264. *Disabled in Action v. Goldschmidt*, No. 80-1862, at 4; *Dopico v. Goldschmidt*, No. 80-4562, at 3.

265. See *Vanko v. Finley*, 440 F. Supp. 656, 663-64 (N.D. Ohio 1977). *Accord*, *Baker v. Bell*, 630 F.2d 1046, 1050 (5th Cir. 1980). Courts do not regard the handicapped to be a suspect class thereby requiring a higher level of judicial scrutiny for purposes of equal protection analysis. The Supreme Court has suggested in dicta that physical disability is a non-suspect status. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). *Accord*, *Gurmankin v. Costanzo*, 411 F. Supp. 982, 992 n.8 (E.D. Pa. 1976), *aff'd*, 556 F.2d 184 (3d Cir. 1976). Commentators have, however, argued with force that the handicapped should be regarded as a suspect class for purposes of equal protection analysis:

Discrimination against the handicapped may be a suspect classification. The courts have found suspect classifications when a particular group involved is saddled with

cases to succeed on statutory rather than constitutional grounds.

By contrast, a third suit against MTA did not allege a violation of section 504 or of any other federal law. Filed by the Eastern Paralyzed Veterans Association,²⁶⁶ it was based solely on two New York statutes which bar discrimination against the handicapped in places of public accommodation: the first, the New York State Human Rights Law²⁶⁷ and second, a public buildings law.²⁶⁸ The

such disabilities, subjected to a history of such purposeful discrimination, or relegated to a position of such political weakness as to require special protection. The stigma of inferiority usually attached to such a classification has been the major determining factor in designating classifications as suspect. Handicapped groups historically have been politically weak and fragmented, and handicapped persons have been stigmatized by society with a badge of inferiority. The handicap condition, often congenital and unalterable, has been analogized to racial classifications which almost always compel the strict standard of review. Classification of the handicapped, involving a politically weak group with a congenital or unalterable trait, similarly should undergo the strictest scrutiny by the courts.

Note, *Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled*, 61 GEO. L.J. 1501, 1504-05 (1973). See also Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 SANTA CLARA LAW. 855 (1975). Moreover, courts have rejected the argument that the right of the disabled to travel merits strict scrutiny because this protection does not apply to intrastate travel. See *Atlantis Community, Inc. v. Adams*, 453 F. Supp. 825 (D. Col. 1978).

266. *Eastern Paralyzed Veterans Ass'n v. Metropolitan Transp. Auth.*, No. 79-18136 (Sup. Ct., N.Y. County, filed Sept. 20, 1979).

267. The New York State Human Rights Law provides:

It shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement, because of the . . . disability . . . of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof. . . .

N.Y. EXEC. LAW § 296(2)(a) (McKinney Supp. 1980). The statute further defines a "place of public accommodation" to include "all public conveyances operated on land . . . as well as the stations and terminals thereof. . . ." *Id.* § 292(9) (McKinney 1972). The New York Human Rights Law is a broad statute which affords protection against discrimination because of race, creed, color, natural origin, age, sex, or marital status. *Id.* The provision barring discrimination against the handicapped was enacted in 1974. 1974 N.Y. Laws ch. 988. The law has had wide application. For example, it has been used to establish tort liability for mental anguish based on unlawful racial discrimination. *Batavia Lodge v. New York State Div. of Human Rights*, 35 N.Y.2d 143, 316 N.E.2d 318, 359 N.Y.S.2d 25 (1974).

268. The New York Public Building Law provides:

In addition to any other requirements respecting the construction of a public building and facilities thereof, the new construction, reconstruction, rehabilitation, alteration or improvement of all such buildings and facilities shall conform to the requirements of the state building construction code relating to facilities for the physically handicapped, except work already completed, work in progress, or work for which sche-

second pleading having been preserved for separate consideration, the trial court in *Eastern Paralyzed Veteran's Association v. Metropolitan Transportation Association*, ruled that the MTA had violated the Human Rights Law, construing the statute to require "special efforts."²⁶⁹ On appeal, the Appellate Division, First Department, reversed. The handicappeds' complaint had alleged that *since* the effective date of the Human Rights Law, September 1, 1974, the MTA had been purchasing inaccessible buses and constructing and reconstructing inaccessible transportation terminals and stations,²⁷⁰ all public accommodations within the meaning of the act. As explained in the plaintiff's brief, the alleged acts "constitute the making of *new* barriers to the handicapped, which deny to them the enjoyment of places of public accommodation. . . . We do not seek special accommodation of their needs — only access. . . ."²⁷¹ Thus, handicapped plaintiffs in this suit did not seek affirmative action under section 504, but only a cessation of pre-

matic designs have been approved by the effective date of this Act [Sept. 1, 1972]. N.Y. PUB. BLDGS. LAW § 51 (McKinney Supp. 1980). The state building construction code to which new buildings and alterations must conform requires "at least one path of travel consisting of walks, ramps, lobbies, elevators or passageways . . . that provides free and unobstructed access to, and exit from the building." N.Y. STATE BUILDING CONSTRUCTION CODE § C215-2.1 (1972). The Public Buildings Law defines public buildings to mean "any building or portion thereof . . . constructed wholly or partially with state or municipal funds . . . which is likely to be used by physically handicapped persons, including . . . transportation terminals and stations. . . ." N.Y. PUB. BLDGS. LAW § 50(1) (McKinney Supp. 1980). The statute further defines "reconstruction, rehabilitation, alteration or improvement" to mean "only that work which results in a *substantial* change in the structure or facilities of a public building. . . ." *Id.* § 50(6) (emphasis added). Finally, the statute requires the "official, governing body or board having design approval authority for state or municipal building construction [to] determine whether a proposed structure is a 'public building' . . . [as defined and to] ensure that the design of any such building complies with the requirements. . . ." *Id.* § 52. No cases as of this writing have been decided under this statute.

269. *Eastern Paralyzed Veteran's Ass'n v. Metropolitan Transp. Auth.*, 103 Misc. 2d 933, 936, 426 N.Y.S.2d 406, 408 (Sup. Ct. 1980), *modified*, — A.D.2d —, — N.Y.S.2d — (1st Dep't 1980), N.Y.L.J., Dec. 8, 1980, at 5, col. 2 (1st Dep't Dec. 8, 1980). "Defendants acknowledge that as early as 1964 it was the avowed policy of the Federal Government to require local transportation authorities receiving Federal funds to take special efforts in making facilities accessible to the disabled. . . . What is required is 'special efforts' and defendants have not demonstrated . . . that any significant effort was being made." 103 Misc. 2d at 935-36, 426 N.Y.S.2d at 408. The trial court, therefore, citing the UMT Act, appeared to be reading federal requirements into the New York Human Rights Law.

270. Brief for Plaintiffs-Respondents at 4, *Eastern Paralyzed Veteran's Ass'n v. Metropolitan Transp. Auth.*, — A.D.2d —, — N.Y.S.2d — (1980), N.Y.L.J., Dec. 8, 1980, at 5, col. 2 (1st Dep't Dec. 8, 1980).

271. *Id.* at 9-10 (emphasis added).

sent and continuing violations of the state Human Rights Law.²⁷² The First Department, however, rejected this argument that the law barred construction of new barriers, holding that the Human Rights Law did not require affirmative action. Under the "plain language" rule, no requirement of "special efforts," as the trial court had held, existed: "Where the legislature has wished a particular state agency to take 'affirmative action' on behalf of the disabled or handicapped, it has so stated in unambiguous terms."²⁷³ By contrast, because the statute's plain definition of "discrimination" forbids "segregation and separation,"²⁷⁴ the New York State Division of Human Rights in prior administrative rulings had required retrofitting of even *pre-existing* structures to accommodate the handicapped.²⁷⁵

No judicial determination has yet resulted as to the Public Buildings Law cause of action brought by the Eastern Paralyzed Veterans.²⁷⁶ Final rulings on either complaint grounded on New York law favorable to the handicapped may very well have nationwide repercussions in encouraging suits under state anti-discrimination statutes²⁷⁷ in view of the fact that most states have enacted

272. *Id.* at 9.

273. N.Y.L.J., Dec. 8, 1980, at 5, col. 2.

274. N.Y. EXEC. LAW § 292(19) (McKinney 1972).

275. See State Div. of Human Rights *ex rel.* Sciacca v. Food Fair, Inc., CPD-39878-75 (1979) (pre-existing structure outside supermarket required to be modified because the law "imposes a duty to make public accommodations accessible to disabled individuals") *Id.* at 5; State Div. of Human Rights *ex rel.* Brewer v. Cohen Brothers, GCPD-393572-75 (1978) (Defendants by maintaining steps denied complainant the privileges of a place of public accommodation, in violation of the Human Rights Law.). A court generally should show great deference to the interpretation given a statute by the agency charged with its administration. *Udall v. Tallman*, 380 U.S. 1, 16-18 (1965).

276. Eastern Paralyzed Veterans' Ass'n v. Metropolitan Transp. Auth., No. 79-18136 (Sup. Ct., N.Y. County filed Sept. 20, 1979).

277. Interview with James Weisman, Counsel, Eastern Paralyzed Veteran's Ass'n, in New York City (Mar. 10, 1981). Conversely, it is possible that an unfavorable final ruling in New York state court could have a devastating effect of judicial precedence on subsequent suits by the New York City handicapped alleging MTA's violation of section 504. For example, in *Mitchell v. National Broadcasting Co.*, 553 F.2d 265 (2d Cir. 1977), a former employee filed an administrative complaint with the New York State Division of Human Rights alleging violation of the Human Rights Law. Having exhausted her administrative remedies, appellant sought judicial review in the Appellate Division of the New York State Supreme Court ruling which affirmed the administrative decision against her. The appellant then filed suit in federal court, alleging violation of 42 U.S.C. § 1981 (1976), which bars racial discrimination in the making and enforcement of contracts. The district court held that the state administrative and judicial proceedings had a *res judicata* effect barring later

laws similar to New York's Human Rights Law²⁷⁸ and Public Buildings Law.²⁷⁹ Due to the uncertain status of section 504 and the futility of alleging claims solely on constitutional grounds, decisions based on state law could contribute significantly to the right of the handicapped to accessible mass transportation.²⁸⁰

action under section 1981, and the Second Circuit affirmed. 553 F.2d at 266-68. The second claim, however, must present a sufficiently similar issue for *res judicata* to bar a suit. As the Supreme Court has stated:

[a] right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.

Southern Pac. R.R. v. United States, 168 U.S. 1, 48-49 (1897). *Accord*, *Mitchell v. National Broadcasting Co.*, 553 F.2d at 268-73. The principle of *stare decisis* might then extend the court's adjudication as to the fact of MTA's compliance to bar suits by other plaintiffs. "But *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940).

278. For example, California law provides:

Blind persons, visually handicapped persons, deaf persons, and other physically disabled persons shall be entitled to full and equal access, as other members of the general public, to accommodations, advantages, facilities, and privileges of all common carriers, airplanes, motor vehicles, railroad trains, motorbuses, street cars, boats or any other public conveyances or modes of transportation. . . .

CAL. CIV. CODE § 54.1(a) (West Supp. 1981). In language arguably less mandatory in nature, North Dakota law states: "It is the policy of this state to encourage and enable the blind, the visually handicapped, and the otherwise physically disabled to participate fully in the social and economic life of the state and to engage in remunerative employment." N.D. CENT. CODE § 25-13-01 (1978).

279. Among the states which have enacted public building laws barring discrimination against the handicapped, New York's is one of the very few which contains no waiver clause of any kind. *See also* IOWA CODE ANN. § 104A (West Supp. 1981). Most provide for waiver of accessibility requirements under a variety of circumstances. One of the states allowing especially broad waivers is Arkansas which stipulates certain buildings should be made accessible "except where such compliance is impractical in the opinion of the enforcing Agency." ARK. STAT. ANN. § 14-627 (1979). Another such state is Minnesota: "[n]othing . . . shall be construed to require remodeling . . . solely to provide accessibility and usability to the physically handicapped when remodeling would not otherwise be undertaken." MINN. STAT. ANN. § 471.467(2) (West 1977). Other states allow waivers for cost. *See, e.g.*, S.C. CODE § 10-5-270(b) (Supp. 1980) (where cost of accessibility construction "exceeds seven percent of the total construction.") and W. VA. CODE § 18-10F-3(3) (1977) (if "compliance therewith would create financial hardship"). Alabama allows a waiver if "an alternative facility is already reasonably available." ALA. CODE § 21-4-5(b) (1975). Texas, on the other hand, repealed its public building accessibility law in 1979. TEX. CIV. CODE ANN. § 678g (Vernon Supp. 1981).

280. Decisions regarding accessibility to mass transportation based on state law should

VI. Conclusion

During the debates in the closing hours of the 96th Congress, one congressman described the mass transportation accessibility problem as requiring a choice:

There are two key words to describe the current controversy. One is the word, "mainstream," and the the other is "mobility." Do we put in place a system that mainstreams the handicapped into every vehicle be it light rail, heavy rail or other transit mode, or, do we provide mobility and make sure that the system we put in place gives the elderly and handicapped as much mobility as possible?²⁸¹

The legislative history of the Rehabilitation Act makes it clear that Congress intended the handicapped to be integrated into mainstream society.²⁸² Imposition of such a dichotomy, moreover, runs afoul of the Federal-Aid Highway Act which requires *effective* use of mass transportation for the handicapped — mobility.²⁸³

While section 504's early history was closely tied with the Civil Rights Act of 1964, Congress, courts, and administrative agencies have increasingly lost sight of the statute's genesis. What began as a humanitarian gesture to give the handicapped substantive statu-

not, however, affect the right to bring a private cause of action under section 504 in view of the fourth requirement of the *Cort* test. See notes 59, 66 *supra* and accompanying text. Accessibility to mass transportation is not an area traditionally relegated to state law. First, as the legislative history of the UMT Act of 1964 noted: "[m]ass transportation needs have outstripped the present resources of the cities and States, and a nationwide program can substantially assist in solving transportation problems." H. REP. NO. 204, 88th Cong., 2d Sess., 4-5, reprinted in [1964] U.S. CODE CONG. & AD. NEWS 2569, 2573. Second, the rights of the handicapped are of national concern. As the legislative history of the 1974 amendment to the Rehabilitation Act states:

The [Senate Committee on Labor and Public Welfare] recognizes that actions taken in the last few years in the courts, the State legislatures, at the local level, and in the Congress have laid the groundwork for substantial change in the lives of individuals with handicaps. Now more than ever a concerted and in-depth examination must be made of all aspects of law and public policy which affect individuals with handicaps.

For all of these reasons, it is of utmost necessity that a *national forum* be provided to focus attention on these problems and their solutions.

S. REP. NO. 1297, *supra* note 20, at 51, [1974] U.S. CODE CONG. & AD. NEWS at 6401 (emphasis added). Furthermore, when state and federal claims have been joined in the same suit, courts have been reluctant to exercise pendant jurisdiction. See *Atlantis Community, Inc. v. Adams*, 453 F. Supp. at 826; *United Handicapped Fed'n v. Andres*, 409 F. Supp. at 1302.

281. 126 CONG. REC. H11927 (daily ed. Dec. 4, 1980) (remarks of Rep. Edgar).

282. See note 103 *supra*.

283. See notes 9-10 *supra* and accompanying text.

tory equal protection rights²⁸⁴ has since disintegrated into yet another "symbolic law"²⁸⁵ with practically no enforcement muscle behind it. The Supreme Court's conclusion that affirmative action is not generally required in a cause of action based exclusively on section 504²⁸⁶ places an onerous burden on the handicapped.²⁸⁷ If the Court holds in *University of Texas v. Camenisch* this term²⁸⁸ that no private right of judicial action exists,²⁸⁹ section 504 will be of limited utility in enforcing the civil rights of the handicapped,²⁹⁰ especially given the long history of administrative inaction. While the DOT regulations, governed in part by section 504, specify the steps which must be taken to make mass transit accessible, federal fund recipients, the MTA in particular, have evidenced their reluctance to comply and have been lent an increasingly sympathetic ear by the federal government.²⁹¹ Thus, handicapped groups will

284. As Senator Hubert Humphrey remarked in arguing for section 504, "it is essential that the rights of these forgotten Americans [the handicapped] to equal protection under the laws be effectively enforced," quoted in A. Laski, *Legal Strategies to Secure Entitlement to Services for Severely Handicapped Persons*, VOCATIONAL REHABILITATION OF SEVERELY HANDICAPPED PERSONS 4 (G. Bellamy ed. 1979).

285. See "*Crips*" Unite, *supra* note 16 and accompanying text.

286. Southeastern Community College v. Davis, 442 U.S. 397 (1979).

287. The Supreme Court in *Davis* ignored its prior holding in *Lau v. Nichols*, 414 U.S. 563 (1974), a decision which should have served as precedent for a finding of affirmative rights for the handicapped suing under section 504. See notes 52-57 *supra* and accompanying text. See also *Atlantis Community, Inc. v. Adams*, 453 F. Supp. at 829 ("The plaintiffs have made a compelling case for their needs for affirmative action to end their isolation and to give an opportunity to enter into the mainstream of community life. . . . They are denied opportunities for employment, education, cultural enrichment and the sharing of the society of others. Isolation has deprived them of identity. . . .")

288. 616 F.2d 127 (5th Cir.), cert. granted, 49 U.S.L.W. 3332 (Nov. 4, 1980).

289. Such a finding would contradict the Supreme Court's reasoning in *Lau v. Nichols*, 414 U.S. 563 (1974). It would also violate the Court's rules set forth in *Cort v. Ash*, 422 U.S. 66 (1975).

290. The Congressional Budget Office study commented:

If the Congress wishes to offer handicapped persons transportation services that they can and will use, door-to-door services and specially equipped automobiles appear most promising. On the other hand, if the Congress views this as a civil rights issue and decides that all person [sic] must be furnished equal access to existing public transportation services, the [DOT] Transit Plan goes further than the two [alternative plans] in ensuring such equality.

CBO Study, *supra* note 181, at S8152 (emphasis added).

291. The handicapped argue that mass transportation is the most effective way for them to gain employment and become self-sufficient, thereby reducing costly federal expenditures such as disability insurance benefits currently funded at some \$125 billion per year. N.Y. Times, Apr. 7, 1981, at B9, col. 1.

have to be innovative in finding rights conferred by statutes other than section 504.

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Since this Comment went to press, two cases which were on appeal have been decided. In University of Texas v. Camenisch, the Supreme Court remanded the case for trial on the merits to determine whether the university should be required to pay for the sign-language interpreter. 49 U.S.L.W. 4468, 4470 (1981). Although the unanimous Court did not address the merits, Chief Justice Burger, writing a concurring opinion, noted that the "trial court must . . . decide whether the federal regulations at issue, which go beyond the carefully worded nondiscrimination provision of § 504, exceed the powers of the Department of Health and Human Services under § 504." Id. at 4471. In a similar vein, the District of Columbia Court of Appeals in American Public Transit Association v. Lewis, No. 80-1497, held that the DOT regulations were inconsistent with Southeastern Community College v. Davis due to the "extremely heavy financial burdens [they impose] on local transit authorities." No. 80-1497 (slip op. May 26, 1981), reversing American Public Transit Association v. Goldschmidt, 485 F. Supp. 811 (D.D.C. 1980).

